SUPREME COURT, U. S.
SEP 22 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 435

In the Matter of
UNION LEADER CORPORATION,
PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit in support of the judgment here sought to be reviewed is not yet reported, but is printed as Appendix A to this petition.

The related opinion of the United States District Court for the District of Massachusetts is unreported, but is printed as Appendix B to this petition.

An Opinion of the Court of Appeals for the First Circuit denying a motion to stay pending a determination of this petition is unreported, but is printed as Appendix C to this petition.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit here sought to be reviewed was dated June 27, 1961, and said judgment was entered the same day.

An Order of the Court of Appeals for the First Circuit denying petitioner's motion for leave to file a petition for rehearing in typewritten form was dated and entered July 10, 1961.

An Order of the Court of Appeals for the First Circuit denying a petition for rehearing was dated and entered June 12, 1961.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1).

Questions Presented

The questions presented are:

When all facts in petitioner's timely affidavit are assumed to be true, whether they are facts from which a sane and reasonable mind might fairly infer personal bias and prejudice on the part of the trial judge.

Whether a trial judge or an appellate court can substitute its conclusion that a trial judge's prejudiced utterances do not mean what they say for the conclusion of an affiant under 28 U.S.C. §144 that the prejudiced utterances do mean what they say.

Whether a petitioner, or any litigant similarly situated, is entitled to be assured that the trial judge is free of personal bias and prejudice.

Whether the public respect for the integrity of the Federal Courts can be maintained if an apparently prejudiced trial judge is permitted to remain in a case.

Statutes Involved

The statutes involved are:

Title 28, U.S.C., Section 1651 (a).

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28, U.S.C. Section 144.

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed no less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Statement of the Case

I. Background

Petitioner Union Leader Corporation, a New Hampshire corporation, is plaintiff and defendant on a counterclaim in a private antitrust action in the United States District Court for the District of Massachusetts against Newspapers of New England, Inc., The Haverhill Gazette Company, both Massachusetts corporations, and other defendants for violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 7 of the Clayton Act, 15 U.S.C. §18. The counterclaim was filed by The Haverhill Gazette Company. The case was assigned for all purposes to the Honorable Charles E. Wyzanski, Jr. The basis for jurisdiction in that Court of first instance is Section 4 of the Clayton Act, 15 U.S.C. §15 and also 28 U.S.C. §1337.

The Trial Court, pursuant to Rule 42 (b) of the Federal Rules of Civil Procedure, ordered a separate trial on all issues other than damages. The trial on all issues other than damages was held without a jury, and resulted in findings, conclusions and a partial final decree to the effect that both petitioner and The Haverhill Gazette Company violated the antitrust laws by attempting to monopolize the Haverhill newspaper market. This was decided on December 28, 1959 and amended on January 4, 1960. The opinion is reported at 180 F. Supp. 125, but is not reproduced as an appendix hereto as it is not relevant to the subject matter of this petition.

An appeal was taken to the United States Court of Appeals for the First Circuit, and on December 2, 1960 the judgment as to petitioner was sustained, but as to The Haverhill Gazette Company it was reversed. The opinion is reported in 284 F.2d 582, but is not reproduced as an appendix hereto as it is not relevant to the subject matter

of this petition. This Court denied petitioner's Petition for a Writ of Certiorari as to the issues of liability on March 6, 1961 and denied a Petition for Rehearing of Denial on April 17, 1961.

II. Issue of Prejudice

Upon the denial by this Court on March 6, 1961 of the Petition for Certiorari relating to the issue of liability, the certified judgment of the Court of Appeals for the First Circuit in lieu of formal mandate issued on March 10, 1961.

Within ten days thereafter, on March 20, 1961 petitioner filed an Affidavit of Prejudice pursuant to 28 U.S.C. 144, which affidavit, minus the appendices thereto which are a part of the certified record before this Court, is appended hereto as Appendix D. On the same day, the Trial Judge ordered this affidavit, and a similar one filed in another case three days earlier, "struck" from the clerk's file, as shown in Appendix B. Also on that same day the Trial Judge issued an Order, after having heard oral arguments on March 14, 1961 as to intervenor's motion to protect its ultimate judgment at which time petitioner advised the Trial Judge it intended to file an affidavit of prejudice, enjoining petitioner from making certain encumbrances.

Within ten days thereafter, on March 30, 1961 petitioner filed a motion with the Clerk of the Court of Appeals for the First Circuit for leave to file a petition for a writ of mandamus in typewritten form seeking a Court of Appeals order directing the Trial Judge to take no further proceedings, assigning another trial judge and for such other relief as may be agreeable to the usages and principles of law.

On April 5, 1961, the First Circuit ordered that, in view of the facts that a motion was pending before it for leave

to file a mandamus petition and that a petition for rehearing was pending in this Court, all further proceedings in the District Court be stayed.

On April 21, 1961 the First Circuit allowed petitioner's motion for leave to petition for mandamus and further ordered Honorable Charles E. Wyzanski, Jr. to show cause why mandamus should not issue.

Also on that date the Petition for Mandamus was filed.

The Haverhill Gazette Company was granted leave to intervene on April 27, 1961 pursuant to its motion of April 26, 1961.

The intervenor, The Haverhill Gazette Company, was authorized by the First Circuit on May 8, 1961 to file an answer instead of the answer required of the Honorable Charles E. Wyzanski, Jr., pursuant to said Judge's assent and to its motion of May 5, 1961.

On May 12, 1961 the Court of Appeals, consisting of Hartigan, Aldrich and Gignoux, JJ. (Judge Woodbury having voluntarily disqualified himself on April 26, 1961) heard oral arguments, and on June 27, 1961 a judgment was entered denying petitioner's mandamus petition. (See Opinion of Aldrich, J., Appendix A.)

Thereafter, on July 10, 1961 petitioner's motion for leave to file a petition for rehearing in typewritten form was denied. The next day, petitioner file a printed petition for rehearing, and the following day this was denied.

On that same day, July 12, 1961, petitioner filed a motion in the Court of Appeals for stay of all proceedings in the District Court pending a determination by this Court of the instant petition for certiorari as to the issue of prejudice on the part of the trial judge.

The following day the First Circuit denied this motion for stay, and terminated the stay granted by its Order of April 5, 1961. (See Appendix C)

On that very day, the Trial Judge issued an Order,

purportedly under authority of Rule 53 of the Federal Rules of Civil Procedure, assigning the trial of the issues as to damages to a Master. (See Appendix E.) A preliminary informal conference was held with the Master at which petitioner appeared on the stipulation that it did not waive any rights relating to pending or future appeals.

A stay of all proceedings was sought from the District Court pending a determination of this petition, and this was denied on July 19, 1961 with a suggestion that application was available to this Court.

On August 1, 1961 a motion to stay the District Court proceedings, addressed to a single justice of this Court, was filed with the Clerk of this Court, and on the same day said motion was denied by Mr. Justice Frankfurter.

Reasons for Granting the Writ

I. Availability of Remedy

There is no issue as to the right of the United States Court of Appeals for the First Circuit to grant petitioner the relief sought in its petition for a writ of mandamus, nor is there any issue as to the right of this Court to grant that relief. *LaBuy* v. *Howes Leather Company*, 352 U.S. 249; *Berger* v. *United States*, 255 U.S. 22; *In the Matter of Union Leader Corporation*, (C.A. 1, 1961) not yet reported but printed as Appendix A hereto.

II. Timeliness of Affidavit

There is no issue as to the timeliness of petitioner's affidavit of prejudice. It was filed six days after a flagrant manifestation of prejudice on the part of the Trial Judge, and the Court of Appeals held that it was filed in "due course". (See Appendix A)

III. Sufficiency of Affidavit

The issue involves the sufficiency of the affidavit of prejudice and the standards for determining that sufficiency.

As to the sufficiency of the affidavit of prejudice, it is respectfully submitted that any objective analysis of the affidavit (Appendix D) leads to the inescapable conclusion that the Honorable Charles E. Wyzanski, Jr. harbours a personal prejudice against petitioner and its principal officer, William Loeb. Inherent in this conclusion is the recognition that this prejudice on the part of the Trial Judge is not a dormant thing, but rather that it is dominant and the Judge is eager to exercise it aggressively.

In light of the basic conflict between the philosophy of the Trial Judge and that of William Loeb as published editorially in petitioner's papers over a period of several years completely independent of this or any litigation, it is not surprising that when Mr. Loeb first appeared before Judge Wyzanski, the Judge made public mention of the conflict. Despite a desire to avail petitioner of the Judge's offer to disqualify himself, Mr. Loeb authorized his then trial counsel, at counsel's request, to proceed before Judge Wyzanski.

Concededly, this may have constituted a waiver as to the prejudice manifested prior to and on May 5, 1959, which manifestation took a defensive form by stating petitioner was ". . . in the business of attacking me from time to time . . ." and by the astonishing assertion on the part of the Trial Judge that ". . . I am not the slightest bit affected by editorials for or against me . . .". The Trial Judge did preface that assertion with the recognition that no one would believe it.

But what has occurred since May 5, 1959 to disqualify this Trial Judge? As shown in the affidavit, petitioner, a crusading newspaper, uncovered an unusual connection

between Judge Wyzanski's past conduct in a personal land condemnation proceeding and a probation hearing over which the Judge was then, in December of 1960, presiding. This hearing had been front page news for a protracted period, and has been criticized as a public substitute for the secret grand jury with the attendant smears on decent citizens, average and distinguished, some of whom were members of the judiciary, and they included a member of the United States House of Representatives and a Chairman of the Massachusetts Turnpike Authority and former Commissioner of Public Works for the Commonwealth of Massachusetts.

Apparently the Trial Judge was super-sensitive about petitioner's legitimate disclosure of the Judge's prior personal dealings with the Public Works Commission and other state officials, and the results of those dealings. He immediately filed a lengthy explanation which he styled as an exhibit in the probation hearing he was then conducting, and when questioned by petitioner's reporters concerning his version of the dealings the Trial Judge referred to petitioner's publisher as "contemptible", attempted to impose censorship, and referred to petitioner's new stories as "libel". It should be noted that the Boston press and other papers carried this news; that no retractions have been made by any newspaper, and no libel action has been instituted by the Trial Judge against any newspaper.

This conduct on the part of the Trial Court convinced petitioner's publisher and its counsel that when the matter was returned from this Court upon determination of the certiorari petition relating to liability to be retried or to be tried as to the damages issues, that a new judge would have to be assigned if petitioner were to have a fair trial.

On March 14, 1961, four days after the return of mandate following this Court's denial of certiorari, the Trial Judge held a hearing at which petitioner for the first

time had the opportunity to raise the issue of prejudice, and it asked the Trial Judge to transfer the case to another judge. This request was forthwith refused, even before the reasons for the request were given. When thereupon advised that an affidavit would be filed, this advice prompted an attack on petitioner which eliminated any and all doubt as to the capacity and ability of this Trial Judge to act in a manner even approaching judicial impartiality. Petitioner's legitimate news reporting was referred to as misconduct, as reprehensible, and as a contempt of which the Trial Court had "so far" taken no notice. He imputed an evil motive with no support in fact or law, and repeated his statement made a year earlier that petitioner was in the business of attacking him!

Thus, not only does the affidavit state all of the foregoing facts, but it elaborates fully so that it is not conceivable that one could hold that the affidavit was insufficient unless it is judged by standards not permitted by the law.

IV. Standards for Evaluating Sufficiency

In the first place, all facts set forth in the affidavit are assumed to be true, and must be so taken. *Berger* v. *United States*, 255 U.S. 22; *Craven* v. *United States*, (C.A. 1, 1927) 22 F.2d 605, cert. den. 276 U.S. 627; *Mitchell* v. *United States*, (C.A. 10, 1942) 126 F.2d 550, cert. den. 276 U.S. 627, rehear. den. 321 U.S. 887; *In the Matter of Union Leader Corporation*, (C.A. 1, 1961), (Appendix A hereto).

The objective standards by which these assumedly true facts are to be judged in determining the sufficiency of the affidavit are whether they are facts ". . . from which a sane and reasonable mind might fairly infer personal bias and prejudice on the part of the judge." *Hurd* v. *Letts*, (C.A.D.C., 1945) 151 F.2d 121.

It is the duty of all courts not only to be impartial, but scrupulously to guard against any appearance of personal prejudice. *Berger* v. *United States*, *supra*; *Mitchell* v. *United States*, *supra*; *Whitaker* v. *McLean*, (C.A.D.C., 1941) 118 F.2d 596; *Connelly* v. *United States District Court*, (C.A. 9, 1951) 191 F.2d 692; *Green* v. *Murphy*, (C.A. 3, 1958) 259 F.2d 591.

In *Connelly*, *supra*, p. 693, it was held:

> It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there shall also be an atmosphere about the proceeding that *the public will have the 'assurance' of fairness and impartiality.* [Emphasis supplied]

In *Berger*, *supra*, p. 36, this Court held that the purpose of the act providing for disqualification of judges was to insure

> . . . that the tribunals of the country shall not only be impartial in the controversies submitted to them but *shall give the assurance that they are impartial*, free, to use the words of the section, from any 'bias and prejudice' that might disturb the normal courses of impartial justice. [Emphasis supplied]

In *Green*, *supra*, p. 595, the concurring opinion of Circuit Judges Hastie and Staley stated:

> The very special, challenging and often sensational charge of partiality in the administration of justice which is initiated by a formal affidavit of prejudice against a judge should receive final adjudication at first opportunity, if only in the interest of public confidence in the courts.

Neither the District Court nor the Court of Appeals were guided by these standards. The Trial Judge, when asked at the March 14, 1961 hearing to step aside, stated that there was no "misconduct" on his part. He rationalizes that since he is free of misconduct that he is free from prejudice, yet in the same breath manifests it by threatening contempt over a matter entirely unrelated to the case before him, and refers to good journalistic practices concerning his past personal transactions as related to a then current matter to which petitioner was a stranger, as "attacks" upon him.

From this recitation of the facts and lack of intellectual capacity to see the mote in his own eye, it is not surprising that the Trial Judge substituted his personal eagerness to participate as the standard for determining the sufficiency of petitioner's affidavit rather than the standards enumerated above as set by this Court.

The Court of Appeals criticized the Trial Judge's lack of judicial restraint, but held that petitioner's affidavit was insufficient even though the facts were accepted as true, apparently because the judge's intemperate remarks just sounded prejudiced, but really were not; and moreover the Judge was justified inasmuch as he was provoked by petitioner. This summary of the Court of Appeals opinion may be over-simplied, but, stripped to its essentials, it is certainly a justified summary.

Unfortunately, the Court of Appeals, in its understandable reluctance to hold that a judge in one of its Districts is both prejudiced and blind to that fact, has neglected to apply the standards set by this Court for determining sufficiency. The Court of Appeals applied the subjective standards of the Trial Judge and its Circuit Judges for the subjective standards of the affiant and the objective standards of a reasonable man.

Moreover, even though, in accepting jurisdiction, it recognized its supervisory responsibility in administering justice, it has completely ignored the standard set by this Court that lower Federal Courts must give to the public the *assurance* that they are impartial.

V. Supervision and Administration of Justice

Although the following recitation of facts further evidences prejudice on the part of the Trial Judge, they were not incorporated in the affidavit for the reason that they occurred after its execution. Nonetheless, the Court of Appeals properly took cognizance of them as incorporated within the scope of that Court's responsibility for supervising the administration of justice within the First Circuit.

After the Trial Judge declined to honor the affidavit of prejudice but before the Court of Appeals decided the mandamus petition directed at his disqualification, the Trial Judge on April 26, 1961 again made a public display of his prejudiced animosity toward petitioner.

In another entirely unrelated antitrust case over which Judge Wyzanski presided and in which petitioner had no interest, but in which petitioner's counsel represented one of the parties, the Trial Judge publicly apologized to the Attorney General of the Commonwealth of Massachusetts for having assigned an improper motive to him without justification and for labeling it contempt, and thereafter withdrew from the case. The Trial Judge conceded that the wrongful imputation of contempt resulted from a prior controversy in which it was reported to the judge that the Attorney General, when in private practice, had levelled a verbal attack at the Judge.

(If the Judge concedes his human nature in holding a grudge against a lawyer for an alleged verbal attack and

in wrongfully imputing contempt, how can he in good conscience assert that he is impervious to what he styles "attacks" by a newspaperman, and blind himself to his wrongful imputation of contempt). In any event, the Trial Judge used the hearing at which he apologized to the Attorney General and recused himself as a forum to attack petitioner. This is what he said.

> At any rate, unless I am commanded by the Court of Appeals to speak in that Court, I do not intend to speak there; and unless I am commanded by the Court of Appeals no longer to entertain Mr. Loeb's suit and the Union Leader Corporation suit, I am not going to withdraw from that. It is far too interesting.
>
> Moreover, it rather surprises me that a person has any status at the end of the first-half of the game to suggest that the referee, who was qualified at the beginning, is disqualified at the middle because in the meantime the player has been cursing the referee outside of Court.

In relation to the Trial Judge's sport referee analogy, petitioner suggests it is inaccurate. Petitioner's complaint is that the referee, by his conduct off the field during half-time, has given petitioner the impression that the referee has swapped his striped shirt for the opposition's jersey.

The facts in the affidavit alone are more than sufficient to call for recusation, but when those facts are coupled with the foregoing, justice demands that the Trial Judge be compelled by this Court both in its appellate and supervisory capacities to proceed no further with any litigation involving either William Loeb or Union Leader Corporation.

VI. Effect of Appointment of Master

On the very day, July 13, 1961, that the Court of Appeals vacated its order staying all District Court proceedings, the Trial Judge, without prior request or authorization by the parties or either of them, but in purported conformity with Rule 53 of the Federal Rules of Civil Procedure, appointed a Master to hear and determine the issues of damages.

Petitioner appeared at an informal conference held by the Master on the oral stipulation that any and all appearances were without prejudice to petitioners rights either currently in an appeal status or rights to be asserted in subsequent appeals, and the Master advised petitioner that this was understood and agreed to by the Trial Judge.

The final paragraph of the order of reference, Appendix E hereto, provides:

> Unless the parties otherwise stipulate, the report of the master shall not be final, but the parties shall have the rights reserved to them by Rule 53.

Now how does this reference affect the instant appeal? Not in the slightest. Even if petitioner were to stipulate that the report of the Master shall be final, there is a substantial doubt that the intervenor would do likewise. But if both parties did so stipulate, petitioner would still be on trial before an appointee of a prejudiced judge as to which appointment it was not consulted and had no say. But even after a fair trial before a master and a finding of no damages, there remains before the Trial Judge the enforcement of a decree governing petitioner and the awarding of counsel fees as provided in Section 4 of the Clayton Act.

Hence, the issue before this Court is not moot.

Conclusion

The judgment of the United States Court of Appeals should be reversed for the reason that petitioner will otherwise be denied its right to a fair trial, and for the more compelling reason of assuring public respect for and confidence in the United States District Court for the District of Massachusetts and all other Federal Courts.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 5820 (Original).

In the Matter of
UNION LEADER CORPORATION,
PETITIONER.

PETITION FOR A WRIT OF MANDAMUS

Before HARTIGAN and ALDRICH, *Circuit Judges*, and GIGNOUX, *District Judge*.

Ralph Warren Sullivan, with whom *James M. Malloy* and *Morton Myerson* were on memorandum, for petitioner.

Robert H. Goldman, with whom *Frank Goldman*, *Joseph F. Bacigalupo* and *John J. Ryan, Jr.*, were on brief, for The Haverhille Gazette Company, intervenor.

OPINION OF THE COURT.

June 27, 1961.

ALDRICH, *Circuit Judge*. This is a petition for a writ of mandamus to order a judge of the United States District Court for the District of Massachusetts to revoke his action striking an affidavit of bias and prejudice filed pursuant to 28 U.S.C. §144 and to order him to disqualify himself from conducting further proceedings in the case of *Union Leader Corporation* (the present petitioner) v. *Newspapers of New England, Inc.* and *Haverhill Gazette Company*, recently before this court on liability, 1 Cir., 1960, 284 F.2d 582, *cert. den.*, 365 U.S. 833, now pending in the district court for a determination of damages suffered

by Gazette. It is asserted that we have authority to act under the All Writs Act, 28 U.S.C. §1651(a).[1]

We have been traditionally reluctant to permit mandamus to be used as a means of circumventing the policy against intermediate review. See, *e.g.*, *In re Josephson*, 1 Cir., 1954, 218 F.2d 174. It now seems clear, however, that in *In re Josephson* we construed the words "in aid of . . . jurisdictions" too narrowly. See *LaBuy* v. *Howes Leather Co.*, 1957, 352 U.S. 249, 255; *Black* v. *Boyd*, 6 Cir., 1957, 248 F.2d 156, 160-61. In a sense this may merely mean that the emphasis was placed at the wrong point. Our jurisdiction exists, but we must decide whether there are sufficient reasons for its exercise. In *Roche* v. *Evaporated Milk Ass'n*, 1943, 319 U.S. 21, for example, the court explicitly stated that the question was "not whether the court below had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power." 319 U.S. at 25-26. Although it referred to our power as a matter of "sound discretion," 319 U.S. at 25, that case made very clear, by its firm reversal of the decision to issue the writ, that appellate courts must be sure of their grounds. As the court cautioned in *LaBuy* v. *Howes Leather Co.*, *supra*, where the power was characterized in broad terms, "mandamus should be resorted to only in extreme cases." 352 U.S. at 257-58. In short, it is a power to be exercised "sparingly." *Prater* v. *Boyd*, 6 Cir., 1959, 263 F.2d 788, 790. But this is not to say that the sometimes confused distinction between jurisdiction and the proper exercise of it is wholly illusory. For, in addition to more traditional bases for issuing an extraordinary writ, if we properly find "exceptional circumstances," *LaBuy*, *supra*, at 260,

[1] "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

or more loosely, and perhaps more practically, that a writ should issue "in the interest of justice," *Ford Motor Co.* v. *Bisanz Bros., Inc.*, 8 Cir., 1957, 249 F.2d 22, 26; *cf. United States* v. *Beatty*, 1914, 232 U.S. 463, 467 ("furthering justice"), our power to hear the case in a mandamus proceeding is unquestioned.

Initially, we dismiss arguments based upon a claim that a judge against whom a sufficient affidavit of prejudice has been filed ceases to have power to act. Lack of jurisdiction in the district court is a classic example calling for exercise of the writ, *Ex parte Peru*, 1943, 318 U.S. 578; *Ex parte Indiana Transp. Co.*, 1917, 244 U.S. 456; see *Roche* v. *Evaporated Milk Ass'n*, *supra*, at 26, but this use of the writ is usually reserved for those cases where the absence of jurisdiction is plain. See *Ex parte Muir*, 1921, 254 U.S. 522, 534; *Massey-Harris-Ferguson, Ltd.* v. *Boyd*, 6 Cir., 1957, 242 F.2d 800, 803, *cert. den.*, 355 U.S. 806.[2] The very fact that the judge has power to decide whether the affidavit is sufficient or not, *Berger* v. *United States*, 1921, 255 U.S. 22, 36, makes this justification for exercising jurisdiction inapplicable. Likewise, we cannot accept the argument that, absent mandamus, a lengthy trial may ensue for nought. This argument would apply to every interlocutory ruling which might affect the outcome of a case. It has been repeatedly rejected. See, *e.g.*, *Roche v. Evaporated Milk Ass'n*, *supra*, at 30.

But we do find exceptional circumstances in the nature of the particular claim advanced by petitioner. A trial taking place before a judge alleged to be personally biased, particularly when the claimed bias has apparently become a matter of public notice and interest, may be incompatible with the proper administration of justice. If

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[2] Nothing [illegible] said in *In re United States*, 1 Cir., 1961, 286 F.2d 556, 562, *cert. granted sub nom. Fong-Foo* v. *United States*, 6/19/61, was intended to [illegible]an that this was the only basis of mandamus jurisdiction.

the claim is sufficiently meritorious, the proceeding should be aborted rather than corrected. Mandamus has been held to be an approriate remedy to secure the right to jury trial, at least where the right is clear, *Beacon Theatres, Inc.* v. *Westover*, 1959, 359 U.S. 500; *Ex parte Simons*, 1918, 247 U.S. 231, and seemingly even where the right is debatable, *compare* majority opinion *with* dissenting opinion in *Beacon Theatres, Inc.* v. *Westover, supra*, both at 511. From the general standpoint of "the interest of justice," the right to be tried before an unbiased judge is also basic in our judicial system. Although there are differences of opinion, we agree with the concurring judges in *Green* v. *Murphy*, 3 Cir., 1958, 259 F.2d 591, 595, that public confidence in the courts may require that such a question be disposed of at the earliest opportunity.[3] In addition to the cases cited therein, see also *United States* v. *Ritter*, 10 Cir., 1959, 273 F.2d 30, 32, *cert. den.*, 362 U.S. 946. This need not commit us to entertaining every rejected affidavit of prejudice; nor need we presently set forth the limits. It is to be borne in mind that mandamus is a discretionary writ.

Strictly, the district judge is the respondent in such mandamus proceedings, but with his assent, and in accordance with our customary practice, we have permitted intervenor Gazette to file an answer instead.[4] We deal in-

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[3] We also subscribe to the statement in Judge Hastie's opinion that it may sometimes be an unhappy situation for a district judge to conduct a trial while an affidavit of prejudice is pending, but we do not regard that in itself as a basis for mandamus. If a judge is in fact embarrassed he can certify the case for an interlocutory appeal under 28 U.S.C. §1292(b), or voluntarily recuse himself even though he regards the affidavit as insufficient.

[4] Petitioner argues that the fact that intervenor is appearing here shows its belief that the judge is prejudiced in its favor—else, why should it care whether he is disqualified or not? Because this argument may have at least a superficial appeal, we might, in the future, reconsider our practice if a situation arose where an affidavit was filed against a judge before any proceedings had taken place. But where

itially with its contention that the certificate of counsel accompanying the affidavit should have stated that counsel was acting in good faith, not that affiant was. The statute requires "a certificate of counsel of record stating that it is made in good faith." The question is what, or who, the word "it" refers to. While some courts have assumed that the statute was aimed merely at counsel's opinion that his client was acting in good faith,[5] all agree that the affidavit has indispensable value. See *Berger* v. *United States*, 1921, 255 U.S. 22, 33; *Beland* v. *United States*, 5 Cir., 1941, 117 F.2d 958, 960, *cert. den.*, 313 U.S. 585; *Currin* v. *Nourse*, 8 Cir., 1934, 74 F.2d 273, 275, *cert. den.*, 294 U.S. 729; *Morse* v. *Lewis*, 4 Cir., 1932, 54 F.2d 1027, 1032, *cert. den.*, 286 U.S. 557; *United States* v. *Gilboy*, D.C.M.D. Pa., 1958, 162 F. Supp. 384, 391, *petition for writ of mandamus den. sub. nom. Green* v. *Murphy*, 3 Cir., 1958, 259 F.2d 591. One may well question the value of counsel's opinion of what is in his client's mind, and we certainly must disagree with *Flegenheimer* v. *United States*, 3 Cir., 1936, 110 F.2d 379, 381, that it is a client's "right" to have counsel's certification when counsel believes the affidavit's recitation to be false.[6] If a certificate is to serve the pur-

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a case, and particularly an antitrust case, has already been tried at length on the merits, the issue of damages, although separate in a sense, is necessarily tied into matters already heard. Resumption before the same judge would undoubtedly be a simpler, shorter and less costly procedure than it would be to recommence with a new one. Intervenor accordingly has an immediate and legitimate interest to protect.

[5] The court in *Flegenheimer* v. *United States*, 3 Cir., 1936, 110 F.2d 379, assumed that this, or something even less perfunctory, was all that the statute called for. *Cf. Nations* v. *United States*, 8 Cir., 1926, 14 F.2d 507, *cert. den.*, 273 U.S. 735 (without discussion, certification of affiant's good faith accepted as sufficient).

[6] We believe we are supported in this by those cases in which the certification requirement was not permitted to be obviated by an affiant's claiming to represent himself on this issue. See, *e.g.*, *Mitchell* v. *United States*, 10 Cir., 1942, 126 F.2d 550, 552, *cert. den.*, 316 U.S. 702.

pose of shielding a court which cannot test the truth of claimed facts, it should at least carry the assertion that counsel believes the facts alleged to be accurate and correct.

Beyond this, there is the element of legal sufficiency. It would seem meaningless to ask a lawyer to certify that his client believed an affidavit to be legally sufficient while thinking it frivolous himself. Federal Rule of Civil Procedure 11, 28 U.S.C., states that counsel, in filing a pleading, impliedly certifies "that to the best of his knowledge, information, and belief there is good ground to support it." See also Rule 56(g). The disqualification of a judge scarcely merits a lower standard. See *United States* v. *Gilboy*, *supra*, at 392; *Denis* v. *Perfect Parts, Inc.*, D.C.D. Mass., 1956, 142 F. Supp. 263, 264; *United States* v. *Lattimore*, D.C.D.C., 1954, 125 F. Supp. 295, 296. We interpret "it" in the statute as referring to the application as a whole, and hold that counsel's good faith must be stated.[7] We intimated that this was our view in *Craven* v. *United States*, 1 Cir., 1927, 22 F.2d 605, 607, *cert. den.*, 276 U.S. 627, but we have never actually decided this question and other circuits have seemingly adopted a contrary rule. See fn. 5, *supra*. For these reasons, and because the court below did not reject the affidavit on this ground, we think it would be unfair to announce our interpretation now other than prospectively. We pass, therefore, to the merits.

In an editoral printed in 1950 petitioner, a publisher of a daily newspaper in Manchester, New Hampshire, criticized a group of prominent Bostonians for the

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[7] What legislative history there is supports our conclusion. The act as originally drawn required "a certificate of counsel of record that *such affidavit and application* are made in good faith." 36 Stat. 1090. (Ital. suppl.) The codifier's note to the revision, 62 Stat. 898, explained two other alterations to the section, and concluded that "changes were made in phraseology and arrangement" without commenting on the particular change here involved.

position they were taking on Far Eastern affairs, charging that they were misguidedly playing into the hands of the Russians. Respondent judge was one of a dozen individuals named. At some other time, the date and circumstances not appearing, petitioner criticized the judge for some apparent public position on the subject of Alger Hiss. In December 1956, on its editorial page, petitioner published a criticism of Harvard University, and notably of the judge as president of its Board of Overseers, in connection with the selection as a lecturer of one Oppenheimer, who had had difficulties with the federal government. This was followed by a front-page editorial on the same subject, prominently mentioning the judge, in February 1957, and by an inside editorial two months later. On January 13, 1959, the complaint was filed in petitioner's action and forthwith drawn to the judge in accordance with local practice. On March 5, 1959, at the first hearing, the judge made the following statement:

> "I feel I am bound now to make a comment which may be wrong. I know nothing whatsoever about any of these parties. In my naivete I didn't know until now that the Haverhill Journal had some relationship to a Manchester newspaper. I do not read the Manchester Press. And although no one will believe it, I am not the slightest bit affected by editorials for or against me, but I know there has been some Manchester newspaper which has been in the business of attacking me from time to time, and I don't know whether it is the plaintiff or not. I am quite immune from any bias with respect to it because I don't even read this stuff, but I think I ought to say to you that I know that somebody has been doing it, and maybe it is this plaintiff. If this plaintiff regards me as in any way biased, I wish the plaintiff would say so."

Petitioner's affidavit states:

> "On advice of counsel, plaintiff Corporation did not ask the Court to disqualify himself despite the fact that the Court mentioned *editorials* which had not been previously discussed before him, despite the fact that there has only been one newspaper in Manchester for many years and despite the fact that plaintiff Corporation was not in the *business* of attacking anyone." (Ital. in original).

Pausing here, we assume that all of petitioner's publications were within the scope of fair comment upon matters of public interest. Whether they could also be construed as attacks upon the judge is another matter. Petitioner denies that they were. At the same time, petitioner was fully informed at the ontset that the judge construed them as attacks, and felt that petitioner was "in the business" of attacking him, and if it believed this to be a form of hypersensitivity on his part, or a ground for disqualification, it had fair notice and full opportunity then to extricate itself.

Thereafter the case was tried to the court. On December 28, 1959, the court made detailed findings of fact and conclusions of law and filed a lengthy opinion, deciding, as related in our earlier opinion, that petitioner had violated the act, and, because of what we considered a too restrictive view of the law, that intervenor had as well. In October 1960, shortly after the cross-appeals had been argued, but before decision, petitioner criticized the judge in a front-page editorial for having written a letter to the then governor of Massachusetts complaining of the governor's delay in filling certain judicial vacancies. On the inside page the editorial reviewed all of the previously mentioned matters for which petitioner had earlier criticized the judge, and concluded with an expression of petitioner's opinion that a judge should hold himself aloof from all public con-

troversy that did not come before him in the course of his official duties. This was exactly the same sort of "attack" as those to which the judge made reference on March 5, 1959, but more vigorous, being a black-print editorial, in a form which petitioner expressly stated therein might be regarded by the judge as "unduly harsh."[8]

On December 2, 1960, we handed down our opinion setting aside the portion of the decision below that had been in favor of petitioner, and affirming that which was against it. On December 20, 1960, petitioner published an item concerning a land-taking settlement made by the judge in 1951 on behalf of himself and his family with the Commonwealth of Massachusetts when one Callahan was Commissioner of Public Works. Petitioner says this item was "timely and newsworthy" because of a currently publicized probation hearing before the judge in the matter of one Worcester in which "many news stories speculated that Mr. Callahan was the true protagonist." It says that this exclusive story connecting the judge with Callahan was for the purpose of giving petitioner "added prestige and recognition." We have some doubts whether an account of this nine-year-old settlement had any news value except for the fact that publication of itself carried the implication that there was something significant about it.[9] We are reminded of the story of the mate who wrote in the ship's log, "Captain sober today." The mate's explanation that it was the truth did not destroy the overtones or innuendoes. Petitioner stoutly maintains that there was

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[8] We note also that repetition of the earlier criticisms of events long past may have been evidence of malice, *cf. Conroy* v. *Fall River Herald News Pub. Co.*, 1940, 306 Mass. 488, 492-94, even if the accounts were originally privileged, *cf. Thompson* v. *The Globe Newspaper Co.*, 1932, 279 Mass. 176, 190.

[9] Possibly to prevent its readers from failing to assume that there was more behind the story making it important news, petitioner added that the law had been changed "since that time" so that such settlement had to receive court approval.

no imputation here. We disagree. Subsequent events do not prove otherwise. The fact that other newspapers repeated the account, and Callahan himself sought to make use of it, does not establish that it would have had any importance if it had not been launched by petitioner in a setting of impropriety.

The judge immediately released a detailed account of the settlement, which he filed as an exhibit in *United States* v. *Worcester*, D.C.D. Mass., 1961, 190 F. Supp. 548.[10] At eight o'clock the next morning petitioner's reporter, one Price, telephoned the judge at his home, "so that I could write a follow-up story." The judge told him petitioner's article was libelous, but refused to give any further "follow-up." Not content with this, Price pursued the judge to his chambers in the Federal Building, hoping that that "might be more productive." His hopes were realized to the extent that the judge, on being asked whether he had any comment, stated that petitioner's actions were "contemptible."[11] This, too, petitioner printed. Thereafter it published something on the 1951 land settlement, sometimes at length, every day for ten days.[12] In January petitioner had Price prepare in affidavit form an account of his conversations with the judge, which it retained "in case . . . a contingency arose." By this last, obviously, it meant if it should later conclude to file an affidavit of prejudice.

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[10] Curiously, petitioner twice insisted during oral argument that the content of the judge's statement was "totally irrelevant" to the *Worcester* case. We cannot reconcile this with its contention that the *Worcester* case made its own article of great public interest and "entirely relevant."

[11] Whether the word was used in its technical sense did not appear, but petitioner has stated that this doubt was resolved by the judge's use of the word "contempt" on March 14, 1961, and we will accept its construction.

[12] "State Paid [Judge's] Heirs at Higher Rate," "Controversial Property," etc.

On March 14, 1961, the court held a hearing on a motion filed by intervenor to enjoin petitioner from encumbering its property so as to reduce its ability to pay damages. Intervenor presented its position, certain comments were made by the court and petitioner made an argument on the merits. Following this, petitioner stated that it intended to file an affidavit of prejudice. The judge replied as follows:

> "There is no reason whatsoever. It is true that your client has been in the business of attacking me, but I haven't attacked your client. And I regard his misconduct as giving no basis for alleging misconduct on my part."
>
> Counsel for petitioner. "Well—"
>
> The Court. "I am going to be quite severe about that because I think that there is nothing more reprehensible than a person, who is a litigant before a Court, trying to disqualify a judge by the litigant's misconduct. It is indeed a contempt of which this Court has chosen so far to take no action. I hope that is entirely clear."
>
> Counsel for petitioner. "Yes, your Honor, it is entirely clear, and we intend to take such steps to protect our client as we can."
>
> The Court. "And I hope in connection with that you will choose to include in your document all the attacks which your client has chosen to place in the press as a means of trying to create a prejudice not on my part but with respect to the case."

The promised affidavit was filed on March 20, and immediately ordered struck. In a memorandum accompanying its order the court declared the affidavit untimely and insufficient. On April 26 there occurred one final incident, called to our attention by petitioner's filing a transcript of certain proceedings in another, unrelated, antitrust case

While the statute permits the filing of only one affidavit,[13] to the extent that this further material may indicate the judge's state of mind regarding the events set forth in the present affidavit we think we may properly consider it. See *Los Angeles Trust Deed & Mortgage Exchange* v. *S.E.C.*, 9 Cir., 1960, 285 F.2d 162, 173. In this unrelated case the judge, in preparing to disqualify himself *sua sponte* therein, made a lengthy review of cases in which he had done so before. Then, apparently to distinguish those cases from the case at bar where he was not doing so, he reviewed the situation here at some length, stating that he did not feel any prejudice, and that he believed, as of course he had already ruled, that the affidavit was insufficient. He concluded his reasons with the following.

> "Moreover, it rather surprises me that a person has any status at the end of the first half of the game to suggest that the referee, who was qualified at the beginning, is disqualified at the middle because in the meantime the player has been cursing the referee outside of court."

As a prelude to taking up the sufficiency of the affidavit, we note that neutrality in the absolute sense cannot be expected. "Personal bias or prejudice" calls only for practical objectives. For example, prior judicial views will not disqualify. See, *e.g.*, *Denis* v. *Perfect Parts, Inc.*, D.C.D.Mass., 1956, 142 F.Supp. 259. That case, alleging patent infringement, was drawn to the same judge who had previously upheld the patent's validity and found it infringed. Doubtless it was not unreasonable for the second defendant to feel his chances of success were lessened because of this circumstance. Yet it would be strange if a judge became less qualified the greater his judicial experience. Obvi-

[13] This scope of the provision has never been determined. Whether it would forbid a second affidavit for entirely new matter occurring after the first, we need not decide.

ously, too, a judge is not prevented from sitting because he comes into every case with a background of general personal experiences and beliefs. *In re J. P. Linahan, Inc.*, 2 Cir., 1943, 138 F.2d 650; see *Ex parte N. K. Fairbank Co.*, D.C.M.D. Ala., 1912, 194 Fed. 978, 989. There must be something unique. Nor will a judge's ordinary and natural reactions to the conduct of, or evidence developed about, a party in a case before him create a disqualification. *Craven* v. *United States, supra.* In the course of a criminal trial, for example, evidence as to a defendant's activities may incite natural disgust. Yet it could hardly be thought that a judge became disqualified because he reacted as would anyone else.

In sum, a judge must be presumed to be qualified, and there must be a substantial burden upon the affiant to show grounds for believing the contrary. This is not an undue requirement. If a party cannot present a sufficient affidavit indicating possible bias, he will still have protection if bias or prejudice appear in fact during the course of the trial. *Compare Knapp* v. *Kinsey*, 6 Cir., 1956, 232 F.2d 458, *with Killilea* v. *United States*, 1 Cir., 1961, 287 F.2d 212, *cert. den.*, 6/19/61.

Theoretically there are two levels to the claim of bias presented by the affidavit herein: (1) The fact alone that the judge was "attacked." (2) The judge's response to the attacks. We could not find the first sufficient. A judge lives in an atmosphere of strife, in which, by nature and experience, he is expected to be a man of "fortitude." See *Pennekamp* v. *Florida*, 1946, 328 U.S. 331, 349. He must continually rule against one party or another. No judge can be so sanguine as to believe that he is never the object of disapproval and criticism directed to something more personal than his abstract judicial actions. If such disapproval is brought openly to his attention he does not automatically change from benign to biased. It is neither

practical nor reasonable to liken a judge to an ostrich, unconcerned so long as his head is in the sand.

It is true that in the case at bar the judge was "attacked" for matters unconnected with the case. But this fact seems relevant only if it could be said that a judge was more likely to be personally affected by one type of charge than by another. In *Keown* v. *Hughes*, 1 Cir., 1920, 265 Fed. 572, 577-78, the court rejected summarily the suggestion that a judge became prejudiced when a party filed an abusive and irrelevant affidavit casting reflections both on the judge and on his father. See also *United States* v. *Fujimoto*, D.C.D.Haw., 1951, 101 F.Supp. 293, 296 (newspaper attack on judge); *Allen* v. *duPont*, D.C.D.Del., 1948, 75 F.Supp. 546, 548 (party brought suit against judge personally). We have found no case which suggests that an affidavit must be ruled to be sufficient simply because it might be natural for a judge to have resented something said about him. It is conceivable that an attack could be so vicious that we would have to presume that the judge had been affected, but, as the cases immediately *supra* indicate, that situation will be rare. It is not here.[14]

The second possible level of petitioner's claim, and the one on which we understand it to rely, is not that an attack on a judge per se disqualifies him, but that in this case the judge's conduct "fair[ly] supports" (see *Berger*

[14] This decision makes it unnecessary for us to attempt to reconcile the conflict which could be created between two important policies: one dictating that a judge who may be biased should not sit, and one requiring that a party be discouraged from attacking a judge during the progress of a suit and thereby obtaining his own deliverance from a trial that is not going well, or from a judge who is not sufficiently favorable to him. As to this last, although petitioner urges its petition entirely on the high plane of protecting the dignity and decorum of the courts, we cannot overlook the circumstance that after the date that petitioner first found him acceptable the judge has resolved many, if not all, disputed questions of fact in its disfavor. It is not inconceivable that in petitioner's eyes this is his principal sin.

v. *United States*, 1921, 255 U.S. 22, 33), its conclusion that bias exists. This is the common, and proper, method of proof. *Cf. Moskun* v. *United States*, 6 Cir., 1944, 143 F.2d 129. Petitioner first points to the judge's statement on March 14 that petitioner is "in the business of attacking me." The obvious answer to this is that if petitioner did not find the judge disqualified in 1959 for that belief, he did not become so in 1961 because he continued to be of the same opinion. Nothing is more important in an affidavit than timeliness, and its counterpart, waiver. See *In re United Shoe Machinery Corp.*, 1 Cir., 1960, 276 F.2d 77, 79; *Eisler* v. *United States*, D.C.Cir., 1948, 170 F.2d 273, 277, *appeal dismissed*, 338 U.S. 883. The statute does not permit second guessing.

Next, petitioner correctly says that the judge expressed the opinion that petitioner was seeking to create grounds to disqualify him. This was a serious charge of misconduct. The judge himself described it as contempt, for which "so far" he had chosen to take no steps. During oral argument petitioner conceded that if it had published these articles for the purpose of disqualifying the judge, it would have constituted contempt.[15] Petitioner denies, of course, that that was its purpose. Whether the judge was correct in his conclusion is a question of fact. Petitioner may have had other motives. But we could not label the judge's view unwarranted. Even assuming that petitioner's article of December 20, whether or not libelous, was highly newsworthy, the conduct of Price, described as one of petitioner's "best reporters," was far and above the ordinary call of duty. Doubtless judges are no more immune from domestic interruption than anyone else, but having

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[15] We have considerable doubt whether it would have been a technical contempt, *cf. Nye* v. *United States*, 1941, 313 U.S. 33, but we have no doubt but that a court could regard it as highly improper conduct.

talked with the judge at his home and received his comment, something obviously to petitioner's liking if it was seeking grounds to disqualify him, why was the judge then pursued to his chambers? Petitioner supplies the answer — to see if something "more productive" could be obtained. If the judge afterwards concluded that the "product" sought was additional fodder for an affidavit of prejudice — proof, in other words, that petitioner's article had hit the mark — we could not say his conclusion was unjustified. It does not seem irrelevant to compare the vehemence with which petitioner contends that it would look badly for its case to be tried by a judge who spoke unfavorably of its conduct, and its industry in seeking out such expressions and printing them.

A judge's reasonable belief that a party was acting with a purpose of disqualifying him, his conclusion that such action was contemptuous and reprehensible, and even a very considerable showing of irritation, is in no way equivalent to personal bias and prejudice. See *Baskin* v. *Brown*, 4 Cir., 1949, 174 F.2d 391, 394; *Foster* v. *Medina*, 2 Cir., 1948, 170 F.2d 632, 633, *cert. den.*, 335 U.S. 909; *Saunders* v. *Piggly Wiggly Corp.*, D.C.W.D.Tenn., 1924, 1 F.2d 582, 585; *cf. In re Lisman*, 2 Cir., 1937, 89 F.2d 898, 899. Nor does it appear that the judge's specific responses on several occasions indicate that his judgment of petitioner's conduct was either produced by, or led to, a "personal" feeling toward petitioner. Petitioner itself has furnished the proper standard of evaluation. In its affidavit it maintains throughout that its many editorial criticisms of the judge were not personally intended, but were merely comments upon, and criticisms of, particular actions of the judge. "Such opposition was not directed towards [the judge] *personally* but was the expression of a militant editorial position . . . ." (Ital. suppl.) Fully to the same extent it can be said that the judge, in criticising peti-

tioner's conduct, was not indicating prejudice against petitioner "personally." When harassed by petitioner's reporter, it might have been ideal for the judge to have remained silent. But, in our opinion, telling the reporter on one occasion that petitioner's article was libelous, and, on another, that its conduct was contemptible, was not intemperate or unjustified in view of the circumstances. Undoubtedly it was primarily from these incidents that the judge formed his opinion of petitioner's purpose, but there is nothing to indicate that these events had any other effect on his mind or conduct. His replies were responsive comments, first when petitioner's reporter asked for his views, secondly, on March 14, when they became pertinent to petitioner's announced intention to file an affidavit.

It is true that the judge's immediate reply to petitioner's announcement, that "there is no reason whatsoever," was unduly precipitate. It is affiant's, not the court's, view of the facts that is controlling. *Berger* v. *United States, supra,* at 34. Petitioner might file an entirely unexpected affidavit, sufficient on its face. If it did so, the court would have to accept it no matter how untruthful it considered its contents. The time to rule was when the affidavit appeared. But this lack of judicial restraint does not indicate personal bias. *Cf. Baskin* v. *Brown, supra; Foster* v. *Medina, supra.* Indeed, the judge's remark suggested the complimentary belief that petitioner would file an affidavit which stated no more than the record facts, which, in due course, petitioner did, and as to which it was entirely appropriate.[16] Nor was the judge's denial that he had been attacking petitioner irrelevant to the issue of the affidavit's sufficiency. This was a necessary

[16] We would not criticize the court for adjuring petitioner to set forth *all* the record facts. The judge was entitled to have his remarks read in context. See *Foster* v. *Medina*, 2 Cir., 1948, 170 F.2d 632, 633, *cert. den.*, 335 U.S. 909.

part of his ruling that he had done nothing which could have suggested he was affected by petitioner's conduct.

Petitioner makes much of the judge's statement that "so far" he has not chosen to take action. This meant, however, no more than that the judge was willing to give petitioner another chance before he took so serious a step, or that he was waiting for a more conclusive record before so doing. If petitioner was uncomfortable as a result of this comment, it had itself to thank. A party cannot engage in conduct which has the outward appearance of being improper, and then complain of the consequences when its conduct is taken at face value.

Possibly more troublesome is the incident which occurred on April 26. The difficulty arises not so much from the content of the remarks made by the judge as from the fact that they were made at all. While petitioner complains of the statement that it had been "cursing the referee," we would be the last to say that all judicial language must be dry and prosaic. This was merely a dramatization of the earlier phrase, "in the business of attacking me," to which petitioner had no objection at the outset of the case. Nor could it be said that the judge's reasons for regarding the affidavit insufficient indicated prejudice when they were in fact correct. At first blush the judge's remarks on April 26 might be taken to indicate an over-preoccupation with the case and petitioner's charge of prejudice. This, in turn, might indicate the existence of personal feeling. However, when one reviews the entire record on that day the prominence diminishes. The judge mentioned five other cases in which he had voluntarily disqualified himself or had offered to do so. All were equally introductory to his forthcoming decision. It is not inappropriate for a judge to set forth his reasons for disqualifying himself. There is as much obligation upon a judge not to recuse himself

when there is no occasion as there is for him to do so when there is. See *Tucker* v. *Kerner*, 7 Cir., 1950, 186 F.2d 79, 85; *Sanders* v. *Allen*, D.C.S.D.Calif., 1944, 58 F.Supp. 417, 420, *appeal dismissed*, 9 Cir., 1945, 151 F.2d 534. In our opinion it would have been much better to have omitted discussion of the present case while it was before the court, but it cannot be said that there was undue emphasis when the judge was talking about everything else as well. While it is possible for the two to merge, there is a substantial distinction between talking and bias.

The petition for mandamus is denied.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 59-23-W

UNION LEADER CORPORATION
v.
NEWSPAPERS OF NEW ENGLAND, INC. ET AL

Civil Action No. 60-692-W

UNION LEADER CORPORATION
v.
THE HAVERHILL GAZETTE COMPANY

MEMORANDUM
March 20, 1961

WYZANSKI, D. J.

The so-called "affidavit of prejudice" is struck from Civil Action No. 60-692-W, from Civil Action 59-23-W, and from every other part of the Clerk's file.

1. The purported "facts" set forth in the affidavit are, on their face, even if they be hypothetically assumed to be true, no ground for a reasonable "belief that bias or prejudice exists", within the meaning of that phrase in 28 U.S.C. §144.

2. Therefore, the affidavit, on its face, is not "sufficient" as that adjective is used in 28 U.S.C. §144, *Eisler* v. *U.S.*, App. D.C., 170 F.(2d) 273, *Keown* v. *Hughes*, 1st Cir., 265 Fed. 572, cf. *Berger* v. *U.S.*, 255 U.S. 22.

3. The affidavit was not filed until March 17, 1961. The complaint in Civil Action No. 59-23-W had been filed January 13, 1959. This Court entered judgment against plaintiff on the issue of liability, on December 28, 1959. The Court of Appeals had affirmed that judgment on December 2, 1960. The Supreme Court had denied a petition for certiorari on March 10, 1961. And the Court of Appeals had entered its order in lieu of mandate on March 10, 1961. The recital of these dates shows that the affidavit was not "timely", as that adjective is used in 28 U.S.C. §144. *Refior* v. *Lansing, Drop Forge Co.*, 6th Cir., 124 F.(2d) 440; *Scott* v. *Beams*, 8th Cir., 122 F.(2d) 777.

Affidavit struck.

(s) CHARLES E. WYZANSKI, JR.
United States District Judge

Appendix C

United States Court of Appeals
For the First Circuit

No. 5820 (Original).

In the Matter of
UNION LEADER CORPORATION,
PETITIONER.

PETITION FOR A WRIT OF MANDAMUS.

Before HARTIGAN and ALDRICH, *Circuit Judges*,
and GIGNOUX, *District Judge*.

Ralph Warren Sullivan, with whom *James M. Malloy* and *Morton Myerson* were on memorandum, for petitioner.

Robert H. Goldman, with whom *Frank Goldman*, *Joseph F. Bacigalupo* and *John J. Ryan, Jr.*, were on brief, for The Haverhill Gazette Company, intervenor.

OPINION OF THE COURT
ON MOTION FOR STAY.
July 13, 1961.

PER CURIAM. Petitioner has filed a motion in effect asking us to stay the proceedings in the district court until a petition for certiorari which it proposes to file from our denial of its petition for mandamus has been disposed of. The interruption of proceedings in the district court by motions short of permitted interlocutory appeals is not to be lightly undertaken. The granting of petitioner's original motion for leave to file a petition for mandamus was a discretionary matter. We exercised our discretion in its favor only because the complexity of the questions made

us hesitate to take action without fuller consideration. Now that this has been afforded and petitioner's affidavit of prejudice has been found to be without merit, we cannot undo the interruption that has already occurred,—but at least we do not wish to prolong it. The motion is denied

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 59-23-W

UNION LEADER CORPORATION,
PLAINTIFF,
v.
NEWSPAPERS OF NEW ENGLAND, INC., ET AL.,
DEFENDANTS.

AFFIDAVIT OF PREJUDICE UNDER TITLE 28 U.S.C. §144

Union Leader Corporation, acting by and through its President and Publisher, William Loeb, on oath deposes and says:

1. Union Leader Corporation (hereinafter referred to as Union Leader) is the plaintiff in this action and defendant on the counterclaim.

2. Union Leader believes and avers that the Honorable Charles E. Wyzanski, Jr., the United States District Judge to whom this case has been assigned has a personal bias and prejudice against the Union Leader and its President and Publisher, William Loeb.

3. The facts and reasons for the belief that such personal bias and prejudice exist are as follows:

(a) During its entire existence, while William Loeb has been President and Publisher, the Union Leader has faithfully attempted to report all the news accurately and without bias. It has printed news articles concerning many public officials, including news stories of Federal District Court Judge Charles E. Wyzanski, Jr. As a policy, the Union Leader has always printed the news fearlessly and

honestly regardless of the personages involved, or the power and authority which such persons may invoke, believing that the primary responsibility of a newspaper is to report to the public all the facts that it can on matters of public interest regardless of whether or not such facts are pleasing or displeasing to persons in authority. In addition, as a policy and a practice, the Union Leader newspapers have always made a clear delineation between fact and opinion, carefully confining its opinions to editorials. In these editorials, the Union Leader and its President and Publisher, William Loeb have taken public stands on most of the controversial issues of the day. On a number of these issues, a few relating to judicial behavior but mostly to general public policy questions, Judge Wyzanski and William Loeb have differed. In such cases, William Loeb in signed editorials in the Union Leader has openly and strongly opposed the positions taken by Judge Wyzanski. The first such editorial signed by William Loeb opposing a public position taken by Judge Wyzanski appeared in the plaintiff corporation's newspaper on December 9, 1950. This editorial is attached hereto as Exhibit 1. It vigorously opposed the position of the group known as the Dover Committee and named among others Judge Wyzanski.

(b) In 1956 and 1957, the plaintiff Corporation in editorials signed by William Loeb vigorously opposed the appointment of one Robert Oppenheimer as the William James Lecturer to Harvard University. At this time, Judge Wyzanski was chairman of the Board of Overseers of said University and as such was singled out for censure in Union Leader Editorials as shown by Exhibits 2, 3 and 4 attached hereto.

(c) In all of these editorial comments referred to above, the Union Leader and its President and Publisher, William Loeb took exception to positions on public issues taken by

Judge Wyzanski. Such opposition was not directed towards Judge Wyzanski personally but was the expression of a militant editorial position which the affiant believes is the proper way to run a newspaper. Sometime, in 1959, when affiant learned that Judge Wyzanski was assigned to the instant case, he questioned his counsel as to the propriety and possible bias of the Judge. Counsel assured affiant that there would be no bias. On March 5, 1959, at the first court hearing before Judge Wyzanski, the Court made the following statement p. 29, 30:

> I feel I am bound now to make a comment which may be wrong. I know nothing whatsoever about any of these parties. In my naivete I didn't know until now that the Haverhill Journal had some relationship to a Manchester newspaper. I do not read the Manchester Press. And although no one will believe it, I am not the slightest bit affected by editorials for or against me, but I know there has been some Manchester newspaper which has been in the business of attacking me from time to time, and I don't know whether it is the plaintiff or not. I am quite immune from any bias with respect to it because I don't even read this stuff, but I think I ought to say to you that I know that somebody has been doing it, and maybe it is this plaintiff. If this plaintiff regards me as in any way biased, I wish the plaintiff would say so. I am so free from it, as a matter of fact, as I tell you, that I don't read these things.

On advice of counsel, plaintiff Corporation did not ask the Court to disqualify himself despite the fact that the Court mentioned *editorials* which had not been previously discussed before him, despite the fact that there has only been one newspaper in Manchester for many years and despite the fact that plaintiff Corporation was not in the *business* of attacking anyone.

(d) About a year after the trial of this case ended, Judge Wyzanski was featured prominently on the front pages of most Massachusetts newspapers as the Judge presiding over the Thomas Worcester case. There were many references in these stories to William F. Callahan, former Commissioner of Public Works, and presently, Chairman of the Massachusetts Turnpike Authority, who was under subpoena as a witness in the Worcester case. Many news stories speculated that Mr. Callahan was the true protagonist in that case. Accordingly, when affiant received information in December of 1960 that Judge Wyzanski and William Callahan had had prior dealings in relation to land taking, affiant believed that the story, if true, would be timely and newsworthy. In fact, since no other newspaper had printed anything about such a relationship, affiant believed that if the Journal did uncover such a story, it would be the first in the field giving it added prestige and recognition. Union Leader's newspapers have always, to affiant's great pride, been known for imaginative and exhaustive reporting and affiant felt that this would be another "first" to its credit. Since a federal judge was involved and since it was the very judge who presided over the trial of this case, Henry J. Price, the Night City Editor of the Journal and, in affiant's opinion, one of Union Leader's best reporters was sent to Boston to look into the proposed story. To make sure that everything he reported was factual and in every respect accurate, Richard Long, Managing Editor of the Journal was also sent. These two men together checked and verified all statements and, as affiant learned later, called Judge Wyzanski several times to verify certain facts. On their assurance that the news stories were completely accurate and were based upon public records, the printing of the news articles attached hereto as Exhibit 5 was authorized. When affiant learned from Mr. Price that Judge Wyzanski had termed William

Loeb "contemptible" and the Journal "contemptible" as shown in the Price Affidavit attached hereto as Exhibit 6, affiant realized that Judge Wyzanski believed that these legitimate news stories were personal attacks upon him and that he was, as his statements show, clearly biased and prejudiced against the Union Leader and affiant. Affiant then called up counsel and reported these statements. Counsel stated that they believed that having made such a statement, that Judge Wyzanski would undoubtedly disqualify himself when the case came before him again. Being somewhat skeptical, affiant asked if Union Leader had any rights if the Judge refused to disqualify himself. Affiant was told that there was a statute which enabled a litigant to ask a Judge to disqualify himself if he believed sincerely that the Judge was biased for any reason. Affiant suggested to counsel that they record Mr. Price's statement in an affidavit in case such a contingency arose.

(e) On Tuesday, March 14, 1961, which was the first hearing on this case before Judge Wyzanski after denial of Union Leader's Petition for Writ of Certiorari, affiant instructed counsel to ask Judge Wyzanski to disqualify himself because of his personal bias and prejudice towards the Union Leader and affiant. At that hearing the following colloquy took place:

> Mr. Myerson: . . . we had intended, when we thought the mandate of the Supreme Court came down, that we were going to ask your Honor to transfer this case to another judge for any further proceedings.
>
> The Court: I have no intention of doing it.
>
> Mr. Myerson: Well, we intend to file an affidavit, your Honor.
>
> The Court: There is no reason whatsoever. It is true that your client has been in the business of attacking me but I haven't attacked your client. And I re-

gard his misconduct as giving no basis for alleging misconduct on my part.

Mr. Myerson: Well—

The Court: I am going to be quite severe about that because I think that there is nothing more reprehensible than a person, who is a litigant before a Court, trying to disqualify a judge by the litigant's misconduct. It is indeed a contempt of which this Court has chosen *so far* to take no action. I hope that is entirely clear.

Mr. Myerson: Yes, your Honor, it is entirely clear, and we intend to take such steps to protect our client as we can.

The Court: And I hope in connection with that you will choose to include in your document all the attacks which your client has chosen to place in the press as a means of trying to create a prejudice not on my part but with respect to the case.

Affiant believes that this colloquy alone shows the personal bias and prejudice of Judge Wyzanski towards Union Leader and William Loeb by the following facts:

(1) Judge Wyzanski asserted that he would not disqualify himself even before this affidavit was filed.

(2) Judge Wyzanski's statement that "Union Leader has been in the business of attacking me" is the same complaint he made on March 5, 1959. His bias and prejudice are clearly demonstrated by the fact that these so-called "attacks" referred to in the latest hearing were factual news stories concerning a matter which he himself made relevant and newsworthy by his own conduct. As Exhibit 5 shows, Union Leader, in no way, editorialized on these matters nor changed or withheld any facts.

(3) Judge Wyzanski's erroneous statement that the motivation of Union Leader in printing such news stories was to disqualify him from the case is without foundation and the mere ascribing of such a motivation is itself clear indication of a personal bias and prejudice.

(4) The threat of a contempt action against affiant if plaintiff attempts to assert its rights is a misuse of judicial authority which can only show personal bias and prejudice exists.

4. For the foregoing reasons, affiant believes that Judge Wyzanski should disqualify himself from any further proceedings in this case.

UNION LEADER CORPORATION
by (s) WILLIAM LOEB
its President and Publisher

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. March 20, 1961

Personally appeared William Loeb and made oath that he is President and Publisher of Union Leader Corporation, that as such he is duly authorized to execute the foregoing affidavit and cause it to be filed on behalf of said Corporation and that the foregoing affidavit subscribed by him on behalf of said Corporation is true to the best of his knowledge and belief.

Before me

(s) MORTON MYERSON
Notary Public
My commission expires
January 26, 1968

CERTIFICATE OF COUNSEL

March 20, 1961

I, Morton Myerson, counsel of record for the Union Leader Corporation in the above-entitled action hereby certify that the attached "Affidavit of Prejudice Under Title 28 U.S. Code 144" is made in good faith by the Union Leader Corporation, and by William Loeb on its behalf.

(s) MORTON MYERSON
MORTON MYERSON

CERTIFICATE OF SERVICE

March 20, 1961

I, Morton Myerson, of counsel for Union Leader Corporation hereby certify that I served the within "Affidavit of Prejudice Under Title 28 U.S.C. 144" on each of the defendants by mailing a copy thereof, postage prepaid, to counsel for all respondents addressed to:

Frank and Robert Goldman, Esquires
402 Sun Building
Lowell, Massachusetts

Joseph F. Bacigalupo, Esquire
316 Essex Street
Lawrence, Massachusetts

John J. Ryan, Esquire
91 Merrimack Street
Haverhill, Massachusetts

Davenport, Millane & Oldershaw
Louis E. Oldershaw, Esquire
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Springfield, Massachusetts

Withington, Cross, Park & McCann
John F. Groden, Esquire
73 Tremont Street
Boston, Massachusetts

MORTON MYERSON

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 59-23-W

UNION LEADER CORPORATION

v.

NEWSPAPERS OF NEW ENGLAND, INC. ET AL

Civil Action No. 60-692-W

UNION LEADER CORPORATION

v.

THE HAVERHILL GAZETTE COMPANY

ORDER

July 13, 1961

WYZANSKI, J.

1. In this litigation the following procedural steps, among others, have taken place: (1) September 17, 1959 pursuant to Rule 42b of the Federal Rules of Civil Procedure, this Court ordered a separate trial on all issues other than the issues of damages raised by the pleadings; (2) on these other issues this Court held a trial and entered Findings of Fact, Conclusions of Law, and, on December 30, 1959 a partial final Decree (see 180 F. Supp. 125); (3) with some modifications, this judgment was affirmed by the Court of Appeals on December 2, 1960 (see 284 F.2d 582). A petition for writ of mandamus having been sought to prohibit further hearings in this case, the Court of Appeals first granted a stay of the proceedings in this Court, next denied the requested relief, and today refused further to stay the proceedings in this Court, but on the contrary said that the Court of Appeals "do not wish to prolong" the interruption of proceedings in the District Court.

2. The only issues now being left for adjudication relate to damages. These are precisely analogous to issues of damages which would be raised in patent, copyright, and like cases following an appellate adjudication on issues of liability. Such cases are customarily referred to a Master for the ascertainment of damages.

3. In the light of the usual practice in parallel cases, and following the provisions of Rule 53 of the Rules of Civil Procedure, I have concluded that it is in the public interest and the interest of the parties that this case should now be sent to a Master. Among the reasons which have led me to make this reference are that the issues are complicated; they relate in part to details of accounting; and they present questions which perhaps can be better dealt with not on successive, but on staggered, days of hearing.

4. For the foregoing reasons, I refer this case to Derek Curtis Bok, Esq., whose office address is The Harvard Law School, Cambridge 38, Massachusetts, on all issues of damages. I direct him to find the facts, state his conclusions of law, and make any recommendations deemed by him appropriate for judicial action.

5. In performing his functions, he shall use the services of a court reporter to take a transcript of all the evidence and arguments before him, and shall preserve for the Court that transcript, together with all other evidence and exhibits.

6. He may begin the hearings at any time convenient to himself, but not later than October 2, 1961, and he shall file his report with the Court not later than August 31, 1962.

7. He may hold hearings in a courthouse or in any other suitable place to which the public may be given access, such as a public room at the Harvard Law School.

8. The Master shall exercise the power to regulate all proceedings in any hearing before him, to schedule them at times convenient to himself and the parties, and to do

all acts and to take all measures necessary or proper for the efficient performance of his duties under the Order.

9. He may require the production before him of evidence upon all matters embraced in the reference, including all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence. He has the authority to put witnesses on oath. He may himself examine and may call the parties to the action and examine them upon oath.

10. For his services, the Master shall be paid $15.00 per hour for each hour spent either in hearing testimony and argument, or in preparation of his report. In addition, he shall be entitled to all his disbursements, including any necessary secretarial assistance. He shall keep a record of the time and money he spends in connection with this case.

11. Unless the parties otherwise stipulate, the report of the master shall not be final, but the parties shall have the rights reserved to them by Rule 53.

(s) CHARLES E. WYZANSKI, JR.

United States District Judge

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 435.

IN THE MATTER OF

UNION LEADER CORPORATION,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF AS AMICUS CURIAE FOR THE HAVERHILL GAZETTE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 435.

IN THE MATTER OF
UNION LEADER CORPORATION,
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BRIEF AS AMICUS CURIAE FOR THE HAVERHILL GAZETTE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Interest of the Amicus Curiae.

The Haverhill Gazette Company, amicus curiae herein by consent, was the intervenor in the Court of Appeals, by permission of that Court. (See pages 5-6, *infra.*)

Opinions Below, Jurisdiction and Statutes Involved.

See Petition, pp. 1-3. The opinion of the Court of Appeals is now reported at 292 F. 2d 381.

Questions Presented.

I. This case involves the question of the validity, both as to timeliness and as to sufficiency, of an alleged affi-

davit of personal prejudice and of the accompanying alleged certificate of counsel filed by petitioner (allegedly under 28 U.S.C. § 144) in the District Court more than two years after the commencement of the case, *and after liability had been determined adversely to petitioner by the judge against whom the affidavit was filed*, a judge who had offered to disqualify himself in March of 1959, as a result of "attacks" on the judge by petitioner's newspaper, which offer was specifically rejected by petitioner; and where petitioner alleges facts in its affidavit allegedly showing prejudice, which occurred about three months before petitioner filed the affidavit; and where petitioner, knowing such alleged facts, participated in a hearing on a motion for an injunction without any notice to the Court as to alleged prejudice until *after* it had engaged in argument, and heard the estimate of damages of the other side (amicus herein) with reference to the forthcoming trial of damages; and where the principal facts alleged by petitioner in its affidavit relate to whether the judge was personally prejudiced in believing petitioner was seeking, by newspaper attacks, to get the judge to disqualify himself; and whether the judge's statement that this was "contempt" was personally prejudiced.

II. Is the certificate of counsel and therefore the alleged affidavit of personal prejudice fatally defective where the certificate does not state that it is made on the good faith of counsel.

III. Is the remedy of mandamus rather than appeal available to petitioner to attempt to make a trial judge recuse himself by petitioner's filing an affidavit of personal prejudice, which was stricken as untimely and insufficient by the trial judge?

IV. Is the petition herein moot where, since the judgment of the Court of Appeals, the District Court has ap-

pointed a Master and the petitioner never objected formally to such appointment?

Counter-Statement of the Case.

Amicus curiae herein, and intervenor below in the Court of Appeals, The Haverhill Gazette Company (hereinafter referred to as amicus), accepts the "Statement of the Case" as set forth in the petition (pp. 4-7), but with the following additions and corrections:

In the private anti-trust action referred to (Petition, p. 4), civil action No. 59-23-W, which began in January, 1959, after lengthy preliminary proceedings, all parties having waived trial by jury, a lengthy separate trial (pursuant to Rule 42(b) of the Federal Rules of Civil Procedure) was had in November and December, 1959, on all issues raised by the pleadings other than issues of damages in said Civil Action No. 59-23-W before Hon. Charles E. Wyzanski, Jr., as a judge of the District Court of the United States for the District of Massachusetts. The judge found that the said Union Leader Corporation is liable to The Haverhill Gazette Company, under The Haverhill Gazette Company's counterclaim and supplemental counterclaim, for a number of violations of the anti-trust laws; and, after appeal by the Union Leader Corporation to the Court of Appeals for the First Circuit and the denial of a writ of certiorari (No. 658, October Term, 1960, *Union Leader Corporation* v. *Newspapers of New England, Inc., et al.*) and a denial of a petition for a rehearing of such denial, by this Court, there remains to be determined before the said District Court *only the amount of damages to be found,* under said counterclaim and supplemental counterclaim, *against the Union Leader Corporation.*

The District Court (180 F. Supp. 125) and the Court of Appeals (284 F. 2d 582, cert. den. 365 U.S. 833) found petitioner liable to The Haverhill Gazette Company in connection with the operation of its Haverhill newspaper, The Haverhill Journal, for numerous illegal violations of the anti-trust laws, including inducing a group boycott by eight principal Haverhill Merchants of the established Haverhill newspaper, The Haverhill Gazette, owned by amicus; Union Leader Corporation's illegal actions with respect to joint visits by Haverhill Journal advertising solicitors and certain union representatives to Haverhill merchants (the Court of Appeals said Union Leader Corporation's part in these actions demonstrated an intent to exclude competition unlawfully in violation of the anti-trust laws), and numerous illegal advertising discriminations in the Haverhill Journal. As the Court of Appeals put it (Appendix to Petition in No. 658, p. 35; hereinafter: "A.P. 658 p. —), Union Leader Corporation in 59-23-W was "a party who pursue[d] an unlawful course of conduct from the moment it appears on the scene . . ." in Haverhill. Union Leader Corporation had offered the 8 Merchants a guaranty totalling at $1,000,000 over a period of years if and when the Journal, under Loeb's (majority stockholder, and president, and dominant figure of petitioner) ownership and control, became the only newspaper publishing in Haverhill. The Court of Appeals in its opinion on Union Leader Corporation's appeal on this point with respect to the 8 Merchants stated: "We confess an inability to understand the basis of the Union Leader's appeal on this question" (A.P. 658, p. 28). All these violations of U. L. Co. *had put the H. G. Co. in peril of insolvency in the equity sense* (Record in No. 658, p. 1095). (See footnote 14, A.P. p. 30.)

In its statement of the case it is indeed surprising that petitioner does not directly specify what actually took place

on March 14, 1961 (see p. 5 of Petition). The petitioner waited till *after* amicus argued, and *after petitioner itself argued on the merits,* before raising any question whatsoever of alleged personal prejudice of the judge as to matters which had allegedly taken place *years* before (Appendix to Petition, pp. 41-42, and *months* before, R. 5-10, 49-52; A.P. pp. 43-44, p. 26). As the Court of Appeals put it (A.P. p. 27):

> "On March 14, 1961, the court held a hearing on a motion filed by intervenor to enjoin petitioner from encumbering its property so as to reduce its ability to pay damages. Intervenor presented its position, certain comments were made by the court and *petitioner made an argument on the merits. Following this,* petitioner stated that it intended to file an affidavit of prejudice." (Emphasis supplied.)

As to the position taken by amicus, the Court of Appeals, it is submitted, correctly set this forth in its opinion (A.P. pp. 20-21, footnote 4), after permitting an intervention therein "in accordance with our customary practice" and with the "assent" of Judge Wyzanski (A.P. p. 20):

> "Petitioner argues that the fact that intervenor is appearing here shows its belief that the judge is prejudiced in its favor—else, why should it care whether he is disqualified or not? Because this argument may have at least a superficial appeal, we might, in the future, reconsider our practice if a situation arose where an affidavit was filed against a judge before any proceedings had taken place. But where a case, and particularly an antitrust case, has already been tried at length on the merits, the issue of damages, although separate in a sense, is necessarily tied into

matters already heard. Resumption before the same judge would undoubtedly be a simpler, shorter and less costly procedure than it would be to recommence with a new one. Intervenor accordingly has an immediate and legitimate interest to protect."

Amicus believes it properly may be considered as a respondent herein, but has filed this brief as an amicus curiae, with the necessary consents, to avoid at this stage any such question of its status.

Finally, by letter of September 29, 1961, after the petition herein had been filed, petitioner wrote to Mr. Justice Frankfurter (copy to H. G. Co.'s counsel, the Chief Justice, Judge Wyzanski, and the Solicitor General) a letter requesting him to "take no part" in considering or determining the allowance of this present petition, on the ground that Justice Frankfurter is "personally acquainted with both the publisher who ass[redacted] the existence of personal prejudice on the part of the Judge, and with the Judge who denies his prejudice."

"It is our information and belief that Judge Wyzanski has enjoyed a close personal and professional relationship with you [*i.e.*, Justice Frankfurter] which covers a long span of years and this is widely recognized in the First Circuit."

(In petitioner's petition, p. 12, last paragraph, petitioner states that the Court of Appeals erred herein because of its "understandable reluctance [*sic*] to hold that a judge in one of its Districts is both prejudiced and blind to that fact." It would seem that the Court of Appeals is not entitled, in petitioner's opinion, to the assumption that it acts in any case before it, irrespective of who may be the parties before it, impartially.)

Argument.

The Court of Appeals held that the remedy of mandamus was procedurally available in the instant case, but the petition for mandamus would not be granted under the circumstances. Amicus contends in point IV below that an additional ground for supporting the judgment of the Court of Appeals herein is that in fact mandamus was not and is *not* procedurally available to the petitioner herein. The party successful below may of course sustain the judgment below on any ground finding support in the record. *Jaffke* v. *Dunham*, 352 U.S. 280.

I. Untimeliness of Affidavit.

The affidavit was not "timely" as required by the statute (28 U.S.C. § 144).

Petitioner states as follows on this point (Petition, p. 7):

> "There is no issue as to the timeliness of Petitioner's affidavit of prejudice."

Indeed, the Court of Appeals emphasized the fact that petitioner's affidavit was *not* timely in important respects:

> "Petitioner first points to the judge's statement on March 14 that petitioner is 'in the business of attacking me.' The obvious answer to this is that if petitioner did not find the judge disqualified in 1959 for that belief, he did not become so in 1961 because he continued to be of the same opinion. *Nothing is more important in an affidavit than timeliness,* and *its counterpart, waiver.* See In re United Shoe Machinery Corp., 1 Cir. 1960, 276 F. 2d 77, 79; Eisler

v. United States, D.C. Cir., 1948, 170 F. 2d 273, 277, appeal dismissed, 338 U.S. 883. *The statute does not permit second guessing.''* (Emphasis supplied.) (A.P. p. 31.)

Petitioner now concedes that this ''may'' have constituted a waiver as to a ''prejudice'' ''prior to and on May 5, (*sic*—for March 5) 1959'' (Petition, p. 8).

Further, as the Court of Appeals indicated in the part of its opinion (A.P. p. 27) passed over ambiguously by petitioner, and quoted by amicus *supra* at p. 5, the petitioner waited at the hearing on March 14, 1961, to talk about prejudice until *after* petitioner argued on the merits.

The Courts have been very strict where the question of timeliness, as required by the statute, is involved.

In *Eisler* v. *United States,* 170 F. 2d 273 (App. D.C. 1948), appeal dismissed 338 U.S. 883, affiant contended that he did not know that the judge against whom the affidavit was filed was to be assigned to the case until May 20. The original trial date was May 26. Several days prior to that date counsel for affiant requested a continuance of the argument on preliminary motions and of the trial. *Continuance was granted of the trial to May 27, but the motions were argued and disposed of on May 23 by the judge.* On May 23 motion was made for a further continuance on the ground that the brother of chief trial counsel had just died. The continuance was granted until June 4. The affidavit of bias and prejudice was filed on May 29, *nine days after affiant contended that he first knew of the assignment.* The Court of Appeals for the District of Columbia held that the affidavit was untimely. Here the affidavit in 59-23-W was filed ten days *after* the mandate was filed in the District Court. See also *Minne-*

sota & Ontario Paper Co. v. *Molyneaux* (C.C.A. 8, 1934), 70 F. 2d 545, 547.

Petitioner argued below and states or implies here (Petition, pp. 9-10) that it could not file the affidavit until after the mandate came down. *But this is obviously not so;* for the stay of mandate did not stay the injunctions of the District Court or the interpretation of it's partial final decree. As paragraph 12 of the partial final decree states:

> "Jurisdiction of this cause is retained for the purpose of enabling any party to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this decree." (R. in No. 658, p. 1106.)

The affidavit was completely untimely and defective, since many of the alleged acts of bias and prejudice of which affiant complains are concededly matters arising in December of 1960, months before the mandate came down. The affidavit is further fatally defective because, as the statute requires, no "good cause" is "shown for failure to file it within such time" (*i.e.*, within ten days of the beginning of the term on March 20, 1961).

The affidavit cites various alleged matters on the first four pages and then states with reference to matters allegedly occurring in *December of 1960* (the affidavit of Henry J. Price, Jr., being not sworn to until January 31, 1961):

> "Affiant was told that there was a statute which enabled a litigant to ask a Judge to disqualify himself if he believed sincerely that the Judge was biased for any reason. Affiant suggested to counsel that they record Mr. Price's statement in an affidavit *in case*

such a contingency arose." (Emphasis supplied.) (A.P. p. 44.) (R. 9.)

See *Laughlin* v. *United States,* 151 F. 2d 281 (App. D.C. 1945), cert. den. 326 U.S. 777, where the Court said at page 284:

> "his [affiant's] action therefore, in *deliberately* holding back the filing until after the first day's proceedings and after Judge Bailey had ruled on sundry matters, . . . was not only not a showing of good cause for the delay, but, as the Judge properly held, *a waiver of Appellant's statutory right to a consideration of the Affidavit.*" (Emphasis supplied.)

See also *Refior* v. *Lansing Drop Forge Co.,* 124 F. 2d 440, 445 (C.C.A. 6, 1942), cert. den. 316 U.S. 671, where the Court said:

> "The statute, by its express terms, requires diligence in filing the affidavit of disqualification and does not permit a litigant, after he has knowledge of the alleged bias or prejudice of the trial judge, *and without notice, to go forward in the cause* without filing such affidavit after the facts of disqualification are known to him." (Emphasis supplied.)

See further *Ex Parte Glasgow,* 195 Fed. 780 (D.C. Ga. 1912, affd. *sub. nom. Glasgow* v. *Moyer,* 225 U.S. 420). See also *Callwood* v. *Callwood,* 127 F. Supp. 179, 182-183 (D. Virg. Is. 1954). See also *Faubus* v. *United States,* 254 F. 2d 797 (C.A. 8, 1958), cert. den. 358 U.S. 829, where Governor Faubus was made a party on September 10, the alleged facts of prejudice were known by then, and he waited

nine more days and until one day before hearing to file the affidavit. The affidavit was held untimely.

It was only near the close of a lengthy hearing in March of 1961 and after petitioner's counsel had argued questions of substance and procedure (pages 29 and 30 of a 37-page record of the hearing of March 14, 1961; for counsel's argument see pages 15-29, *passim* (R. 82-84, R. 67-81) (petitioner having been ordered to file this transcript by order of the Court of Appeals of April 10) that Union Leader Corporation's counsel, almost as an afterthought, stated that he would file an affidavit in 59-23-W against Judge Wyzanski: "Mr. Myerson. No. *And there is one other thing I would like to add,* however, that under instruction of my client, we had—*because of our error in judgment* [*these twenty-seven words preceding are represented by asterisks in the affidavit of petitioner*] we had intended, when we thought the mandate of the Supreme Court came down, that we were going to ask your Honor to transfer this case to another judge for any further proceedings." (Emphasis supplied.)

Petitioner indeed waited till "a contingency arose." *It even waited almost to the end of the hearing of March 14, 1961, and* until *after* it had argued on and heard Haverhill Gazette Company's estimate of damages (about $3,000,000 when trebled, see pages 15-16 of March 14 hearing), and waited four days after the mandate came down before raising a word as to alleged bias or prejudice. Why did not the attorneys for the petitioner *at once,* at the beginning of the hearing of March 14, notify the district judge that the petitioner deemed him (allegedly) too biased and prejudiced to hear the matters before him on March 14, 1961? In the words of *Laughlin* v. *United States, supra,* this was "a waiver of [petitioner's] statutory right to a consideration of the affidavit," aside from all other points presented herein.

As the Court of Appeals aptly put it in *In re United Shoe Machinery Corp.*, 276 F. 2d 77, 79 (C.A. 1, Aldrich, C.J., 1960):

> "The requirement of timeliness is of fundamental importance. The . . . affidavit is untimely as a matter of law. . . . One of the reasons for requiring *promptness* in *filing* is that a party knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives. As was said in State ex rel. Shufeldt v. Amijo, 1935, 39 N.M. 502, at. p. 506, 50 P. 2d 852 at page 855: 'a litigant cannot experiment with the judge presiding over the case: . . . We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking decides to take a plunge.'" (Emphasis supplied.)

As to the *Price* affidavit (R. 49 ff.) the following is noteworthy: that Mr. Loeb learned about the alleged incident as early as December 21, 1960, for the "story" appeared in the Journal of that day. *Yet strangely enough the affidavit was not sworn to until January 31, 1961.* Then to withhold this affidavit for *seven more weeks* before its being revealed to the Court speaks for itself. Such action is exactly what has been, as indicated *supra* and on numerous occasions, condemned by our Courts.

Clearly, further, to file an affidavit well over two years after the commencement of a case is not timely; and ten days after the mandate came down after the denial of certiorari is not timely; and to wait till near the ending of the hearing on March 14, 1961, and then announce to the judge *for the first time* petitioner's alleged belief in the judge's prejudice and bias (arising three *months*

and also two years before) and then to wait six days actually to file the affidavit, this is not "timely" as the word is used in 28 U.S.C. § 144. See *Wyant* v. *Brennan* (C.C.A. 4, 1936), 85 F. 2d 920, 921-922; *Chafin* v. *United States*, 5 F. 2d 592, 594, 595 (C.C.A. 4, 1925).

Perhaps the most important reason as to why the affidavit should have been stricken is the admitted fact (A.P. p. 42 (R. 7)) that Judge Wyzanski *specifically offered on March 5, 1959*, to remove himself from the case even though he was "not the slightest bit affected by editorials" published in Union Leader Corporation's Manchester newspaper, but this offer was *specifically and almost fulsomely* rejected at that very hearing by Union Leader Corporation, Mr. Loeb being present in the courtroom:

> "The Court: And I didn't really know that newspaper had anything to do with this, and I don't read the material and I don't know what they say. *But I do think it is appropriate for me to put on the record that I now for the first time am aware that this is a newspaper which has been engaged in some kind of attack on me. For what, I don't know. Not that I shouldn't be attacked, but I don't read the attacks.*
>
> "*Mr. Bloomberg: For the record, what you say is true. We have discussed this. We will not continue on it, because if I say what I said to my client it might be interpreted as attempting to compliment the court.*" (Emphasis supplied)

(Petitioner surprisingly originally neglected to quote *in full* from the transcript of the March 5, 1959, hearing in its affidavits. The Haverhill Gazette Company, in accordance with the Court of Appeals order of April 27, 1961, included in *its* record appendix the *full* text of the

hearing on this particular point (R. Supplement, added to record herein by agreement of parties). For this reason alone, the affidavit was defective, as the petitioner has thus specifically *waived* any point as to bias or prejudice over two years ago. See *Neal* v. *United States*, 205 F. 2d 121, 125 (C.A. 9, 1953).

This is especially true when it is noted that the judge's words "the business of attacking me" on March 5, 1959, are exactly the same five words as used by the Court over two years later, at the March 14, 1961, hearing. *Petitioner not only did not find them to show prejudice in 1959, but his counsel in effect praised the Court, at that time:* ". . . if I say what I said to my client it might be interpreted as attempting to compliment the court."

Can a party insist, when a judge offers to disqualify himself, that he has full confidence in the Court's fairness and lack of prejudice, wait over two years, and *then*, on matters involving the same subject matter, the petitioner's newspaper articles, insist that the judge disqualify himself? Clearly a party may not so misuse the statute.

II. The Affidavit was Not "Sufficient."

The affidavit was not "sufficient," in the words of the statute (28 U.S.C. § 144).

In alleging prejudice against Judge Wyzanski the affidavit neglects to point out that Judge Wyzanski, over the strenuous objections of The Haverhill Gazette Company, found that The Haverhill Gazette Company had committed illegal advertising discriminations and enjoined it from attempts to monopolize and issued against it the strict requirements of paragraphs 2 and 9 of the partial final decree. These parts of Judge Wyzanski's opinion and decree were reversed by the Court of Appeals, which found in favor of The Haverhill Gazette

Company on this issue, and this Court denied certiorari when Union Leader Corporation, as petitioner, filed a petition for certiorari in this Court. How could the district judge be personally biased against the Union Leader Corporation or Mr. Loeb, its president, when, in an important point in the case, the district judge found in favor of Union Leader Corporation and not against it? See *Kelly* v. *New York, New Haven, & Hartford Railroad Co.*, 139 F. Supp. 319 (D.C. Mass. 1956). (See A.P. p. 30, footnote 14.)

It is respectfully submitted that petitioner's affidavits and exhibits show on their face something less than that "fearless" and "honest" reporting, not "withholding any facts" which petitioner's affidavits set forth. Even assuming that the rule of law under the *Berger* v. *United States* (255 U.S. 22) case is that what is set forth in the exhibits must also be considered by the judge to be true, the affidavits and exhibits disclose: That Price called the judge at his home at 8 a.m. on December 21, went to his (the judge's) office at 9:20 a.m. the same day; at about 9 a.m. on December 22 he went to the judge's office, and again he went on the 29th and the 30th. That the judge expressed irritation at this is not the personal bias and prejudice of which the statute speaks, nor is the fact (assuming again the above rule of law applies) that *the judge believed the articles were aimed at getting him to disqualify himself.* For, even assuming the purity of petitioner's purposes, the articles, taken in connection with what may fairly be called the harassment by Price beginning by telephone calls at 8 a.m. at the judge's house and continuing to the judge's chambers to obtain something "more productive" (R. 49) (page 1 of Price affidavit) (*i.e.*, "additional fodder for an affidavit of prejudice"—A.P. p. 32) on their face show that it *was quite reasonable for the judge to assume that the petitioner's purposes* were less than pure and not merely

concerned with "factual" matters. Examples: (Exhibit 5) "State Paid Wyzanski Heirs at Higher Rate" (1/3/61). "Wyzanski Blasts Press In Boston" (1/6/61). "Controversial Property" (pictures on 1/5/61). There are numerous others.

If a judge honestly states that articles that he very *reasonably* construes as attacks (and the long history of the Union Leader Corporation comments on Judge Wyzanski must be kept in mind in this respect) (see Exs. 1-5) (and note the admission of petitioner's then counsel back at the March 5, 1959, hearing, quoted *supra,* p. 13: The Court: "Not that I shouldn't be attacked but I don't read the *attacks.*" Mr. Bloomberg: "*For the record, what you say is true*" (emphasis supplied)) are, he believes, under all the circumstances intended to get him to disqualify himself in a case *after liability has been determined adversely to the petitioner,* this is not that personal bias and prejudice of which the statute speaks. See *Eisler* v. *United States* (App. D.C.), 170 F. 2d 273; *Keown* v. *Hughes* (C.C.A. 1, 1920), 265 Fed. 572. Particularly is this so when petitioner had ample warning that the judge, back in 1959, construed petitioner's articles as *attacks* and felt that petitioner was "in the business" of attacking him and offered to disqualify himself voluntarily.

For the statute could not have been intended to make a judge disqualify himself, even though he had no bias or prejudice whatsoever, in a case where in fact the affiant did intend by his own attacks to disqualify the judge or the judge could reasonably believe this to be the fact. The rule of the *Berger* case, it is submitted, obviously cannot be extended to cover such a situation.

Further, the fact that a judge believes (even if the judge is wrong) that actions of a litigant are in contempt of Court, or close to contempt, *does not show the personal*

bias and prejudice of which the statute speaks. If this were so, every judge who holds a party in a case before him in contempt, or warns of possible contempt, is guilty of personal bias and prejudice. This of course is not so. See *Foster* v. *Medina*, 170 F. 2d 632 (C.C.A. 2, 1948), cert. den. 335 U.S. 909 (1949) and the related case, *Sacher* v. *United States*, 343 U.S. 1 (1951). (See *Goldfine* v. *United States*, 268 F. 2d 941, 947 (C.A. 1, 1959), cert. den. 363 U.S. 842).

Judge Medina held one of the defendants and some of the attorneys for the defendants in contempt. When a judge holds a party in contempt of Court, or speaks of the party's actions in *connection therewith* as "contemptible" or "reprehensible," this is to uphold the dignity of the law. It is not "personal" bias, hatred, animosity, contempt or prejudice. It clearly does not render the judge unfit to sit further on the principal case.

Indeed, in *Henry* v. *Speer*, 201 Fed. 869 (C.C.A. 5, 1913), the affidavit of bias was based upon a statement of the judge delivered to the newspapers "in which practically every issue is prejudged and determined by the said judge" (p. 870). This affidavit, said the Circuit Court, did not "tend to show the existence of a personal bias or prejudice on the part of the judge towards petitioner but rather a prejudgment of the merits of the controversy and against deponent's right to recover. Section 21 [now 28 U.S.C. § 144] is not intended to afford relief against this situation." Prejudgment alone is thus insufficient under the federal statute. See *In re Lisman*, 89 F. 2d 898, 899 (C.C.A. 2, 1937).

Such "prejudgment" of petitioner's "contempt" or attempted contempt herein (*if* it *was* made by Judge Wyzanski) does not indicate the "personal" prejudice within the meaning of the statute.

Even if the judge in a case is in error in thinking a party before him is guilty of contempt, that does not mean that he should not sit on the principal case. That does not constitute the "personal" bias and prejudice of which the statute speaks; for the judge is clearly acting in a judicial capacity, not with "personal" prejudice.

For any statement by a judge that indicates his concern (as is his duty) with the upholding of the dignity of the Court, and the law, such as in the instant case, is a *judicial utterance* affecting the performance of his duties and does not show "personal" prejudice. The "contempt" referred to in the affidavit, the "contemptible" and "reprehensible" taken in context, relate clearly to possible judicial contempt, not to any "personal" animosity or prejudice.

Thus the statute (28 U.S.C. § 144) may not be used to frustrate its very purpose. For, *if* petitioner and Loeb *were* seeking to get the judge to disqualify himself by their attacks, it was indeed a very flagrant contempt of court (*petitioner has so conceded*—see A.P. p. 31), and, if the judge *reasonably* believed this, and thought this was "reprehensible," "contemptible" and therefore contemptuous of the Court, or "contempt," this is not the "personal prejudice" within the statute. But, at any rate, it is submitted that the petitioner's actions, and Loeb's actions, in the light of all the circumstances, not only could lead the judge reasonably to believe as he did, *but actually, fairly interpreted, show such an improper intent on the part of petitioner. And why did petitioner wait till almost the end of the March 14 hearing to raise the "prejudice" point?* (See *Walker* v. *United States,* 116 F. 2d 458, 460-461, 462 (C.C.A. 9, 1940). See also *United States* v. *Fujimoto,* 101 F. Supp. 293, *infra,* p. 19; *Keown* v. *Hughes,* 265 Fed. 572, 577-578 (C.C.A. 1, 1920). See also

Allen v. *DuPont* (D. Del. 1948), 75 F. Supp. 546, 548 (party brought suit against judge personally).)

Contempt actions, the Courts have always pointed out, are to vindicate the authority and dignity of the Court. It is not a "personal" matter.

Quite different is the *Berger* case (*Berger* v. *United States*, 255 U.S. 22, 1921). There the affidavit stated that the judge said (at p. 28): "One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty." The defendants had been indicted for an illegal violation of the Espionage Act of 1917. This Court held that the remarks made by the judge "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment" (255 U.S. at 33-34).

In *United States* v. *Fujimoto*, 101 F. Supp. 293, 296 (D.C. Hawaii, 1951) (*motion for leave to file petition for writ of prohibition or mandamus denied, Fujimoto* v. *Wiig, U.S. District Judge*, 344 U.S. 852), the District Court said:

> "Only a psychic pleader could allege that because a defendant has published uncomplimentary statements concerning a judge, the latter will be unable to give his critic a fair and impartial trial. If such a *fantastic procedure* were permitted, a defendant could get rid of a judge by the simple expedient of publishing a scurrilous article, *truthfully* alleging the article was published, and clinching the matter by asserting the bald conclusion that, since the article was uncomplimentary, the judge must of necessity be prejudiced against the publisher.
>
> "It is precisely to such bizarre pleading that the admonition in the *Fairbank* case, *supra*, applies; namely, that Congress did not intend 'that any reason

> that a litigant may choose to assign in his affidavit, however absurd or ridiculous in point of law or morals, will disqualify the judge'." (Emphasis supplied.)

Cf. affidavit (A.P. pp. 44, 45) (R. 9): "The Court . . . but I haven't attacked your client . . ." "The Court . . . your client . . . trying to create a prejudice *not on my part* but with respect to the case." (Emphasis supplied.)

Cf. Frank, J., in *In re J. P. Linahan,* 138 F. 2d 650, 653, n. 13 (C.C.A. 2, 1943):

> "There would have been no disqualification of the trial judge in Berger v. U.S. 255 U.S. 22, if he had said, not that he was virtually incapable of being fair to German-American citizens during World War I, but that he was aware of his prejudice and could therefore discount it.
>
> "The unrecognized, unspoken bias is dangerous."

But "*anything less than the personal animosity* toward a party illustrated by the Berger case has been held not enough to indicate the 'personal bias or prejudice' required by the federal statute" (11 Pittsburgh Law Review, 415, 419, "Disqualification for Bias" (1950). (Emphasis supplied.) See, for examples, the following cases: *Baskin* v. *Brown,* 174 F. 2d 391 (C.C.A. 4, 1949); *Hurd* v. *Letts,* 152 F. 2d 121 (App. D.C. 1945) (application for leave to file petition denied); *Price* v. *Johnston,* 125 F. 2d 806 (C.C.A. 9, 1942), cert. den. 316 U.S. 677 (1942); *Walker* v. *United States, supra,* 116 F. 2d 458 (C.C.A. 9, 1940); *Ryan* v. *United States,* 99 F. 2d 864 (C.C.A. 8, 1939), cert. den. 306 U.S. 635 (1939); *Craven* v. *United*

States, 22 F. 2d 605 (C.C.A. 1, 1927), cert. den. 276 U.S. 627 (1928); *In re Beecher*, 50 F. Supp. 530 (D. Wash. 1943); *United States* v. *16,000 Acres of Land*, 49 F. Supp. 645 (D. Kan. 1942); *United States* v. *Buck*, 23 F. Supp. 508 (D. Mo. 1938), appeal dismissed, 102 F. 2d 976 (C.C.A. 8, 1938); *Johnson* v. *United States*, 35 F. 2d 355 (W.D. Wash. 1929).

The numerous and flagrant violations of the anti-trust laws by petitioner, the attempts to monopolize of petitioner that "had put [the Gazette] in peril of insolvency in the equity sense" (A.P. in No. 658, p. 32), a finding specifically affirmed by the Court of Appeals in its opinion in No. 658, the withholding of any mention of prejudice by petitioner for months and until after amicus had presented its damage estimate and petitioner argued, and near the close of the March 14, 1961, hearing—all these factors and all the surrounding circumstances, including the bringing of a groundless anti-trust suit by petitioner against the amicus and others, the petitioner also knowing that *it* was the one engaging in illegal anti-trust violations and in a secret conspiracy; including all the actions of Price and Loeb, including the specific rejection of the judge's offer to disqualify himself *before* the case was tried and the petitioner found liable—all these certainly constitute the pertinent background and facts under which the judge reasonably, and, it is submitted, correctly, assumed that the petitioner's actions constituted "a contempt of which this Court has chosen, *so far*, to take no action" (A.P. p. 45) (R. 9).

The Court of Appeals well summarized this point in holding (A.P. p. 32):

> "A judge's reasonable belief that a party was acting with a purpose of disqualifying him, his conclusion that such action was contemptuous and repre-

> hensible, and even a very considerable showing of irritation, is in no way equivalent to personal bias and prejudice." See *Baskin* v. *Brown*, 4 Cir., 1949, 174 F. 2d 391, 394; *Foster* v. *Medina*, 2 Cir., 1948, 170 F. 2d 632, 633, cert. den. 335 U.S. 909; *Saunders* v. *Piggly Wiggly Corp.*, D.C.W.D. Tenn., 1924, 1 F. 2d 582, 585; cf. *In re Lisman*, 2 Cir., 1937, 89 F. 2d 898, 899."

As for the judge's statement that he "so far" had chosen to take no action, the petitioner obviously cannot reasonably complain that the judge's wanting to give petitioner another chance before he took contempt action constitutes "personal prejudice" (see A.P. p. 34).

Finally, the opinion of the Court of Appeals, it is submitted, clearly demonstrates that there was no personal prejudice shown on April 26, 1961 (A.P. pp. 34-35).

There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is. See *Tucker* v. *Kerner*, 186 F. 2d 79, 85 (7 Cir. 1950); *Sanders* v. *Allen*, 58 F. Supp. 417, 420 (D.C. S.D. Cal. 1944), appeal dismissed, 151 F. 2d 534 (9 Cir. 1945). The "public respect" for the Courts (Petition, p. 16) is not enhanced by upholding insufficient, untimely and defective affidavits of prejudice.

All the cases show that a judge must be presumed to be qualified and there is a heavy burden on the affiant to show grounds for believing the contrary. The affiant, if it cannot so show—and it has not—still has its protection if personal bias or prejudice appears in fact during the trial on damages. Compare *Knapp* v. *Kinsey*, 232 F. 2d 458 (C.A. 6, 1956), and *Killilea* v. *United States*, 287 F. 2d 212 (C.A. 1, 1961), cert. den. 366 U.S. 969.

The trial on damages should proceed with no further delay.

III. The Certificate of Counsel, and therefore the Affidavit, is Defective.

The affidavit herein has annexed a certificate of counsel stating that the affidavit "is made in good faith by the Union Leader Corporation and by William Loeb on its behalf" (A.P. p. 47).

On this point the Court of Appeals in effect held the certificate and therefore the affidavit insufficient, but only as an interpretation made "prospectively."

It is submitted that the ruling on the insufficiency of the certificate should also be applied to this case. See *Jaffke* v. *Dunham*, 352 U.S. 280.

All Courts agree that the certificate has indispensable value (see cases cited at A.P. p. 21).

As the Court of Appeals put it (A.P. p. 22):

> "It would seem meaningless to ask a lawyer to certify that his client believed an affidavit to be legally sufficient while thinking it frivolous himself." See Federal Rules of Civil Procedure, Rules 11 and 56(g), 28 U.S.C. See also *Craven* v. *United States* (C.C.A. 1, 1927), 22 F. 2d 605, 607, cert. den. 276 U.S. 627.

Counsel for petitioner did not see fit to state in the certificate that it was made in good faith *by counsel*. The certificate (and therefore the affidavit) was fatally defective.

IV. Petitioner's Procedure Below was Fatally Premature and Defective.

It is respectfully submitted that *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249, is distinguishable, since there all *parties desired* the judge to sit on the case and *not* to refer it to a master. Here petitioner seeks the district judge's disqualification for bias and prejudice.

The majority (five to four) opinion of this Court in the *La Buy* case stated:

> "It is true that mandamus should be resorted to only in extreme cases, since it places trial judges in the anomalous position of being litigants without counsel other than uncompensated volunteers." 352 U.S. at 257-258.

Thus the "unusual" and "extreme" circumstances were limited by this Court to cases where there was "clear abuse of discretion or 'usurpation of judicial power'" (352 U.S. at 257).

Neither is present here. At most the petitioner might claim that the judge erred in construing the affidavit and in his ruling upon it, in the light of the statute. Petitioner must wait for his regular appeal. To hold otherwise would, it is respectfully submitted, open the door to all kinds of interlocutory mandamus procedure. This, it is submitted, was not the intention of this Court (352 U.S. at 255). See *Ex Parte American Steel Barrel Co. & Seaman,* 230 U.S. 35, at 45.

In *Albert* v. *United States District Court,* 283 F. 2d 61, 62-63 (1960), cert. den. (1961), 365 U.S. 828, the Court of Appeals, Sixth Circuit, correctly, it is submitted, reviewed the cases and held as follows:

> "*The order entered by the District Judge refusing to disqualify himself is not reviewable upon appeal until a final judgment has been entered in the case. . . .*
>
> "*Mandamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of a legitimate jurisdiction. . . . This remedy is reserved for really extraordinary cases. It may not be used as a substitute for appeal.* Roche v.

Evaporated Milk Association, 1943, 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185; Beneke v. Weick, 6 Cir., 1960, 275 F. 2d 38.

"The writ may be granted only where it is clear and undisputable that there is no other legal remedy. Ex parte American Steel Barrel Co., 1913, 230 U.S. 35, 33 S. Ct. 1007, 57 L. Ed. 1379.

"*Mandamus has been held not to be the proper remedy to compel a judge to recuse himself.* Green v. Murphy, 3 Cir., 1958, 259 F. 2d 591; Korer v. Hoffman, 7 Cir., 1954, 212 F. 2d 211, 45 A.L.R. 2d 930; Hurd v. Letts, 1945, 80 U.S. App. D.C. 233, 152 F. 2d 121." (Emphasis supplied.)

See also *Green* v. *Murphy*, *supra*, 259 F. 2d 591, at 594, n. 4 (C.A. 3).

Appeal, not mandamus, was the proper procedure for petitioner to follow.

V. The Petition is Moot.

Irrespective of all other points, Judge Wyzanski on July 13, 1961, appointed a Master to hear damages, and set a date for the hearings to commence (A.P. pp. 49-51). The parties have already appeared before the Master (Petition, p. 15). Petitioner has recently filed a "Reply" to the schedule of damages of amicus and has submitted a "Preliminary Economic Evaluation." No written formal objection has been made or filed by the petitioner to such appointment. If, as petitioner alleges, Judge Wyzanski was too "personally prejudiced" to proceed with the case, why did petitioner not make some written formal objection to the order of the judge appointing Professor Bok as Master? (A.P. p. 50).

The petition is therefore moot and should be dismissed.

Conclusion.

For all the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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